SUPREME COURT, U. S.
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MICHAEL ROD

No. 73-1423

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO, *Petitioner*

v.

NATIONAL LABOR RELATIONS BOARD

AND

TIIDEE PRODUCTS, INC., *Respondents.*

On Petition for Writ of Certiorari Before Judgment to the United States Court of Appeals for the District of Columbia Circuit

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PETITION FOR WRIT OF CERTIORARI BEFORE JUDGMENT

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INDEX

Page

Opinions Below 2

Jurisdiction 2

Questions Presented 3

Statute Involved 4

Statement of the Case 4

- Status of cases in the court below 4
- The certification of the Union 6
- Original decree of Board and court below in Tiidee I 7
- Prior petition for writ of certiorari in Tiidee I 12
- Original decision of Board and court below in Tiidee II 12
- Proceedings before Board and supplemental decisions on remands 14

Reasons For Granting the Writ 17

1. There is a crisis in the administration of the National Labor Relations Act which makes it imperative that this Court review at the earliest possible date the question of the power of the Board to issue a make-whole order to remedy a frivolous refusal to bargain 17
2. The crisis in enforcement of the National Labor Relations Act has been deepened by the Board's refusal to seek injunctive relief under Section 10(j) in refusal to bargain cases, no matter how frivolous 23
3. The court below has issued a full opinion stating its views on all questions presented 25

Page

Conclusion 26

Appendix A 1a

Appendix B 4a

INDEX OF CITATIONS

CASES:

Amalgamated Utility Workers v. *Consolidated Edison Company*, 309 U.S. 261-265 (1940) 23

Bigelow v. *R.K.O. Radio Pictures*, 327 U.S. 251, 264-265 (1946) 23

Boy's Market v. *Clerk's Union*, 398 U.S. 235, 251 (1970) 22

Consolo v. *Federal Maritime Comm.*, 383 U.S. 607, 624-625 (1966) 23

Ex-Cell-O Corp., 185 N.L.R.B. 107 (1970) 17, 18, 22, 23

Nathanson v. *N.L.R.B.*, 344 U.S. 25, 27 (1952) 23

N.L.R.B. v. *American National Insurance Co.*, 343 U.S. 395, 402 (1952) 22

N.L.R.B. v. *Electric Vacuum Cleaner Co.*, 315 U.S. 685, 698 (1942) 23

N.L.R.B. v. *Rutter Rex Mfg. Co.*, 396 U.S. 258, 262 (1969) 23

National Licorice Co. v. *N.L.R.B.*, 309 U.S. 350, 362-363 (1941) 23

Phelps Dodge Corp. v. *N.L.R.B.*, 313 U.S. 177, 197 (1941) 23

H. K. Porter Co. v. *N.L.R.B.*, 397 U.S. 99 (1970) 11

John Singer Inc., 197 N.L.R.B. No. 7, 80 LRRM 1340 (May 25, 1972) 24

Tiidee I, 426 F.2d 1243 (D.C. Cir. 1970), (U.S.C.A.D.C. Cir.) Case Nos. 72-1080, 72-1691, certiorari denied 400 U.S. 950 (1970) 2, 5, 6, 8, 12, 13, 14, 15, 17

Tiidee II, 440 F.2d 298 (D.C. Cir. 1970), Case Nos. 72-1365, 72-1692 .....2, 5, 12, 13, 14, 15, 16, 17

Tiidee Products Inc. v. *N.L.R.B.*, 400 U.S. 950 .....2, 12

Page

STATUTES:

National Labor Relations Act, 61 Stat. 146, 73 Stat. 544, as amended, 29 U.S.C. 151, *et seq.* 2, 4, 1a

§ 8(a)(1) 13, 1a
§ 8(a)(3) 13
§ 8(a)(4) 13
§ 8(a)(5) 17, 20, 1a
§ 10(a) 2a
§ 10(b) 2a
§ 10(c) 22, 2a
§ 10(e) 23, 24, 25, 3a
§ 10(j) 23, 25, 3a

28 U.S.C. § 1254(1) 3

28 U.S.C. § 2101(e) 3

CONGRESSIONAL MATERIAL:

Conference Report, House Report No. 510, 80th Cong., 1st Sess., pp. 56-57, reprinted 1 Leg. His. L.M.R.A. 560-561 25

79 Cong. Rec. 7658, reprinted 2 Leg. His. N.L.R.A., 2370 25

93 Cong. Rec. 3446, reprinted 1 Leg. His. L.M.R.A., 653 24

93 Cong. Rec. 6444 25

Hartley Bill (1947), see House Report No. 245, 80th Cong., 1st Sess., p. 43, reprinted 1 Leg. His. L.M.R.A. 334 25

Hearings on Congressional Oversight of Administrative Agencies (N.L.R.B.) before the Subcommittee on Separation of Power of the Senate Committee in the Judiciary, 90th Cong., 2d Sess., Part 1, 1968, pp. 204, 214, testimony of Mozart G. Ratner 19

House Report No. 1147, Committee on Labor, 74th Cong., 1st Sess., pp. 6-7, 23, reprinted 2 Leg. His. N.L.R.A. 3052-3053, 3073 25

Page

House Report No. 245, 80th Cong., 1st Sess., p. 43, reprinted 1 Leg. His. LMRA 334 25

House Report No. 510, 80th Cong., 1st Sess., pp. 56-57, reprinted 1 Leg. His. LMRA 560-561 25

Report on Administration of the L.M.R.A. by the N.L.R.B. (Comm. Print., p. 2 1961), Subcommittee on N.L.R.B. of the House Committee on Education and Labor, 87th Cong., 1st Sess., pursuant to S. Res. 66 and S. Res. 141, 86th Cong. 2d Sess. 81 (1960) 19, 20

Report to the Senate Committee on Labor and Public Welfare by the Cox Advisory Panel Pursuant to S. Res. 66 and S. Res. 141, 86th Cong., 2d Sess. 81 (1968) 19

Report of the Special Subcommittee on Labor, Committee on Education and Labor, House of Representatives, 90th Cong., 2d. Sess. (Comm. Print., p. 2) 19

Senate Report No. 573, Committee on Education and Labor, 74th Cong., 1st Sess., pp. 5-6, 14, reprinted 2 Leg. His. N.L.R.A. 2304, 2314 24

MISCELLANEOUS:

American Bar Assn., Report of Section on Labor Relations Law, Developments of Law Under the National Labor Relations Act—1968, p. 121 (ABA 1969) 4a

Baier, Paul R., Rights Under a Collective Bargaining Non-Agreement: The Question of Monetary Compensation for a Refusal to Bargain, J. Urban L. 47:253 (1969-1970) 4a

Bok, The Regulation of Campaign Tactics in Representation Elections Under the NLRA, 78 Harv. Law Rev. 38 (1964) 22, 4a

Buffalo L. Rev. 17:830 (Sp. 1968), Recent Developments in the Creation of Effective Remedies Under the National Labor Relations Act 4a

Page

Fanning, John H., Proposals to Speed Taft-Hartley Act Cases, B.N.A., 1970 Labor Relations Yearbook 157 (B.N.A. 1971) 4a

Fanning, John H., New and Novel Remedies for Unfair Labor Practices, Ga. L. Rev. 3:253 (Winter 1969) 4a

Fuchs and Kelleher, The Back-Pay Remedy of the National Labor Relations Board, 9 B.C. Ind. and Com. L. Rev. 829 (1968) 4a

56 Geo. Law Journal 474, 514 (Jan. 1968), Note: Monetary Compensation as a Remedy for Employer Refusal to Bargain 5a

Gross, James A., Economics, Politics and the Law: The NLRB's Division of Economic Research, 1935-1940, 55 Cornell Law Rev. 321, 344-345, fn. 111 (Feb. 1970) 5a

83 Harv. L. Rev. 1732 (May 1970), Remedies: NLRB has authority to order retroactive payments of fringe benefits where employer wrongfully refuses to sign contract 5a

84 Harv. L. Rev. 1670, 1672-1674 (May 1971), Note: NLRB Power to Award Damages in Unfair Labor Practice Cases 5a

19 Kan. L. Rev. 325 (Winter 1971), Note, the *Ex-Cell-O* and *Tiidee Products* Cases—Continuing Controversy Over The Make-Whole Remedy in Refusal to Bargain Cases 5a

McCulloch, Frank W., Past, Present and Future Remedies Under Section 8(a)(5) of the NLRA, 19 Lab. Law J. 131, 141 (1968) 5a

McGuiness, Kenneth, Is The Award of Damages For Refusals to Bargain Consistent With National Labor Policy, 14 Wayne L. Rev. 1086 (1968) 5a

67 Mich. L. Rev. 374 (1968), Note: An Assessment of the Proposed 'Make-Whole' Remedy in Refusal to Bargain Cases 5a

Miller, Edward B., "First Impressions" of the New NLRB Chairman, BNA 1970 Labor Relations Yearbook 206 (BNA 1971) 5a

Page

Murphy, The National Labor Relations Board—An Appraisal, 52 Minn. Law Rev. 819 (1968) 5a

65 North Western Univ. Law Rev. 441 (July-August 1970), NLRB Remedial Orders: a permissible voice in substantive collective bargaining 5a

Ordman, A., National Labor Relations Act: Current developments, New York Univ. Conf. on Labor 24: 115 (1971) 6a

Parker, G. P., Employee reimbursement for an employer's refusal to bargain: the *Ex-Cell-O* (Case No. 25-CA-2377, Mar. 1, 1967) doctrine, Tex. L. Rev. 46:758 (April 1968) 6a

Ross, Philip, Analysis of Administrative Process Under Taft-Hartley, BNA 1966 Labor Relations Yearbook, p. 299 (BNA 1967) 6a

Rutgers Camden Law Journal 3:272 (Fall 1971), Analysis of the NLRB's objections to a make-whole remedy in refusal to bargain cases 6a

Schlossberg, Stephen I., Silard, John, The Need for a Compensatory Remedy in Refusal-to-Bargain Cases, Wayne L. Rev. Vol. 14, No. 4, p. 1059 (1968) 6a

St. Antoine, Theodore, A Touchstone for Labor Board Remedies, 14 Wayne L. Rev. 1039 (1968) 6a

Summers, Clyde W., Collective Bargaining Agreements and the Law of Contracts, 58 Yale Law Journal 525, 572 (March 1969) 6a

Tex. L. Rev. 46:758 (April 1968), Comment, Employee Reimbursement for an Employer's Refusal to Bargain: The *Ex-Cell-O* Doctrine 6a

35 Univ. of Chicago L. Rev. 777, 787 (1968), Comment, Employer's Refusal to Bargain and the N.L.R.B.'s Remedial Powers: The *H. K. Porter* Case 4a

Wolkinson, Benjamin, The Remedial Efficacy of NLRB Remedies in *Joy Silk* Cases, 55 Cornell Law Rev. 1, 36 (Nov. 1969) 6a

Zappacosta, Jack J., An Analysis of the NLRB's Objections to a Make-Whole Remedy in Refusal-To-Bargain Cases, 3 Rutgers Camden Law Journal 272 (Fall 1971) 6a

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On Petition for Writ of Certiorari Before Judgment to the United States Court of Appeals for the District of Columbia Circuit

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PETITION FOR WRIT OF CERTIORARI BEFORE JUDGMENT

The International Union of Electrical, Radio and Machine Workers, AFL-CIO, hereinafter called the Union, petitions for a writ of certiorari before judgment to the United States Court of Appeals for the District of Columbia Circuit to review that portion of

the supplemental decisions and orders of the National Labor Relations Board in the instant cases which denied the remedies requested by the Union. The petition of Tiidee Products, Inc., for a writ of certiorari to review other portions of the supplemental decisions and orders in the instant case which granted certain remedies requested by the Union is pending undecided before this Court in Case No. 73-1180.

OPINIONS BELOW

The supplemental decisions and orders of the National Labor Relations Board, whose validity is in issue in petitions for review and applications by the Board for enforcement, now pending undecided before the Court of Appeals for the District of Columbia Circuit, are officially reported, but unpublished as of yet, at 194 N.L.R.B. No. 198 and 196 N.L.R.B. No. 27 and are printed at App. pp. 83 and 98,[1] respectively. The original decisions of the Court of Appeals and of the Board are reported, respectively, at 426 F.2d 1243 (D.C. Cir. 1970), *certiorari denied,* 400 U.S. 950 (1970); 440 F.2d 298 (D.C. Cir. 1970); 174 N.L.R.B. 705; and 176 N.L.R.B. 969, and are printed respectively at App., pp. 109, 132, 45 and 81.

JURISDICTION

The supplemental decisions and orders of the Board were issued on January 24, 1972 and April 6, 1972 (App., pp. 83 and 98). Cross petitions for review under 29 U.S.C. 159(f) were thereafter filed by the charging party Union and Tiidee. The cases were consolidated and briefed in the United States Court of

[1] All references in this petition to App. — are to the Appendix on file in this Court in No. 73-1180.

Appeals for the District of Columbia Circuit, as Case Nos. 72-1691, 72-1692, 72-1080 and 72-1365, and oral argument was held on September 24, 1973 before a three-judge panel of that Court (Robb, J.; Tamm, J.; and MacKinnon, J.). No decision has yet been issued by the Court of Appeals. Jurisdiction in this matter before rendition of judgment by the Court of Appeals is conferred on this Court by 28 U.S.C. § 1254 (1) and 28 U.S.C. § 2101(e).

QUESTIONS PRESENTED

1. Whether the National Labor Relations Board has the power, as a remedy for an employer's refusal to bargain based wholly on frivolous grounds, to require the employer to make whole the employees and their collective bargaining representative for losses suffered as a result of such refusal to bargain.

2. Whether the Board lacks the power to remedy a frivolous refusal to bargain by an order which requires the employer to make whole losses thereby suffered by employees, computed by the Board on the basis of the wages, hours and other terms and conditions which the other employees have received as a result of collective bargaining.

3. Whether the Board, upon finding that the employer engaged in numerous, repeated and intertwined unfair labor practices, including a frivolous refusal to bargain collectively, abused its discretion by disclaiming the power to provide a meaningful remedy.

4. Whether the Board erred as a matter of law in holding that, even if it did have the power to afford a make-whole remedy, the difficulties in making a fair computation of the losses suffered by employees as a

result of the employer's frivolous refusal to bargain, or the time such a computation would take, excused the Board from making a computation in a case where the Board admitted that the remedy it provided was inadequate to undo the injury so suffered by employees.

5. Whether the Board erred in holding that the practice of the Union, of not collecting initiation fees and dues from employees until it achieves a collective bargaining agreement on their behalf, precluded the Board from entering an order requiring the employer to make the Union whole for the loss of the initiation fees and dues, which it would have collected upon the signing of any agreement by the employer with the Union.

6. Whether the Board erred in holding that the Board was precluded from entering an order requiring the employer to make the collective bargaining representative whole for the amounts it expended because the Union engaged in no extraordinary organizing expense, when admittedly the Union had made expenditures which were rendered useless as a result of the employer's frivolous refusal to bargain.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, 61 Stat. 146, 73 Stat. 544, as amended, 29 U.S.C. 151, *et seq.*, are printed in Appendix A to this petition, pp. 1a-3a, *infra*.

STATEMENT OF THE CASE

Status of cases in the court below

Tiidee Products, Inc., the employer in this case, has filed a petition for a writ of certiorari now pending undecided in this Court (Case No. 73-1180) asking this

Court to review before judgment in the court below two questions, one relating to the power of the Board to order reimbursement of litigation expenses, and the other relating to the propriety of such an order in the instant case (Pet. in No. 73-1180, p. 3). The Union, the petitioner here, opposes a piece-meal review by this Court of only a portion of the cases pending below, but urges upon this Court a review of all the questions now pending undecided in the court below.

There are four cases pending undecided in the court below, two of which are known as *Tiidee I* and two of which are known as *Tiidee II*. All four cases were consolidated in the court below for briefing and oral argument. The two cases known as *Tiidee I*[2] are Court of Appeals Case No. 72-1080 which is the Union petition to review, and Court of Appeals Case No. 72-1691 which is the employer petition to review, the Board's supplemental order in 194 N.L.R.B. No. 198 (App., pp. 83-97), which was before the Board on remand from the Court of Appeal's decision reported in 426 F.2d 1243 (D.C. Cir. 1970), *certiorari denied* 400 U.S. 950 (1970). The two cases known as *Tiidee II*[3] are Court of Appeals Case No. 72-1365 which is the Union petition to review, and Court of Appeals Case No. 72-1692 which is the employer's petition to review, the Board's supplemental order in 196 N.L.R.B. No. 27 (App., pp. 98-106), which was before the Board on remand from the Court of Appeals decision reported in 440 F.2d 298 (D.C. Cir. 1970). The petitions for re-

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[2] *Tiidee I* relates to N.L.R.B. Cases Nos. 9-CA-4440, 4488, 4536 and 4563 (App. pp. 1, 6, 45, 83).

[3] *Tiidee II* relates to N.L.R.B. Cases Nos. 9-CA-4618, 4639-2, 4710 (App., pp. 4, 47, 81, 98).

view filed by the Union challenged the failure of the Board to accord the Union the make-whole and other remedies which the Court of Appeals held the Board had the power to award. The petitions for review filed by the employer challenged the Board's award of litigation costs to the Union and the Board.

The certification of the Union

Tiidee Products, Inc., is engaged in the manufacture of metal and plastic parts for mobile homes and travel trailers at Dayton, Ohio (App., p. 8).

Tiidee's employees were unorganized in July 1967 when the Union began its organizing campaign (App., pp. 8, 13-14). Meetings were held in the homes of employees, employees were solicited to sign authorization cards, and handbills were distributed by the Union in front of the plant (App. pp. 13-14).

On August 1, 1967 the Union filed with the Board a petition for an election (App., p. 8). An election was conducted by the Board on September 14, 1967, which was won by the Union by a vote of 19 to 6, with 3 challenged ballots (App., p. 10).

The employer reacted to the Union's victory in the election by locking out its employees on the morning following the election, laying off the Union observer, and laying off and discharging other Union supporters (App., pp. 20-34).

On September 21, 1967 and October 23, 1967 the first (9-CA-4440) and the second (9-CA-4488) of the four charges of unfair labor practices, which resulted in the case known as *Tiidee I,* were filed by the Union (App. p. 1).

Objections to the election which the employer filed (App. p. 10) were dismissed by the Regional Director without a hearing and on November 8, 1967, the Union was certified (App. p. 10).

Original decree of Board and court below in Tiidee I

In the usual proceedings on charge, complaint, hearing and order of the Board, followed by review and enforcement proceedings in the United States Court of Appeals for the District of Columbia Circuit, the Board found, and the Court of Appeals upheld all of its findings (App. pp. 8-46, 109-125), that the Tiidee Company engaged in the following unfair labor practices:

From the outset of the organizing drive Tiidee's president, Hollander, openly expressed to employees his determination never to have a union in his plant, threatening that "if they got in, he would close the doors" (App. pp. 14, 29). President Hollander and other supervisors unlawfully interrogated employees to determine the identitiy of union adherents and the extent of union activity among employees (App. pp. 14-19, 29-30) and sought to induce employees to act as informers concerning the union activities of fellow employees (App. 14-15, 30). Under employer aegis employees were polled by a supervisory employee who asked each employee to sign a petition with a yes or no after his name indicating whether or not he or she wanted an election to determine if a union should be chosen as his or her representative (App. pp. 16-18, 30).

Following the certification of the Union, Tiidee not only refused even to meet with the Union (App. pp. 10-11, 13) or to furnish it requested information as to

the employee's existing wages and fringe benefits (App. pp. 10, 11, 13) but also engaged in a campaign of eliminating union supporters from the plant by discharging two and laying off others solely because the Union won the election (App. pp. 20-26, 31). Tiidee in retaliation against employees for selecting the Union, also arbitrarily increased production quotas of employees, thereby discriminating against them in order to discourage membership in the Union (App. 25, 32).

While Tiidee purported at the time it refused the Union's initial request for bargaining to base its refusal on its desire to litigate the validity of the certification of the Union (App. p. 11) both the Board (App. pp. 12, 43-46) and the Court (App. p. 115) found that Tiidee's objections to the election were "patently frivolous[4] and violated the express terms of the Agreement for Consent Election, entered into with the Union only thirteen days before the election, to abide by the decision of the regional director" (App. p. 115). Neither before the Board nor in the court did Tiidee ever give "a hint of support or explanation for its claim that the regional director acted 'arbitrarily and capriciously' " (App. p. 115). The Board found that Tiidee's refusal to bargain pending litigation evidenced that the "Employer is seeking to avoid the obligations imposed by statute" (App. p. 13), "evinces

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[4] The statement in the petition now before this Court in No. 73-1180 that the Board in its initial decision in *Tiidee I* made no finding that the Company had engaged in a frivolous refusal to bargain (Pet. No. 73-1180, p. 5) is inaccurate. The Board in its decision in *Tiidee I* adopted all the findings of the Trial Examiner (App. pp. 45-46), one of which was an express finding that the basis of the Company's refusal to bargain was "frivolous" (App. p. 12).

a complete rejection of the collective bargaining principle" (App. p. 36) and "manifested an attitude of hostility directed toward the very basic purposes of the Act" (App. p. 38).

In the court below Tiidee made no effort in either its brief or oral argument to justify its refusal and indeed conceded both its "clear antiunion animus" from the "very beginning" of the organizational drive and its unlawful refusal to bargain collectively (App. p. 111). The court characterized the position of Tiidee as "palpably without merit with respect to its refusal to bargain" (App. p. 118), as a "clear and flagrant violation of the law" (App. p. 115), "a brazen refusal to bargain, in violation of solemn obligations" (App. p. 116), "a manifestly unjustifiable refusal to bargain" and "abuses like those before us" (App. p. 119).

The Union, at the hearing before the Trial Examiner (App. p. 37), in its exceptions to the Trial Examiner's decision and in the court below (App. pp. 111, 124-125) sought an order requiring Tiidee to remedy its refusal to bargain by making whole the employees and the Union for losses suffered as a result of such refusal (App. pp. 37, 111, 124-125). The Trial Examiner "allowed the Union to develop fully in the record all evidence necessary to sustain its position in this issue" but declined to grant the requested remedy because it involved "both legal and policy questions which should be initially considered by the Board" (App. p. 37). Accordingly the Trial Examiner recommended only the conventional prospective type order respecting the refusal to bargain, namely to cease and desist from refusing to bargain and upon request bargain collectively with the Union (App. pp. 37-40).

The Board in its short decision in which it adopted the findings, conclusions and recommendations of the Trial Examiner (App. pp. 45-46), made no mention of the fact that the Union sought any additional remedy.

In a carefully reasoned opinion the court of appeals held that the purely prospective type of order, "assuming" its "general validity", in a case of "brazen refusal to bargain, in violation of solemn obligations", "operates in a real sense so as to be counterproductive and actually to reward an employer's refusal to bargain during the critical period following a union's organization of his plant" (App. pp. 116-117). The court held that a prospective-only order did not further labor policy because it enabled an employer to reap two fold benefits from his refusal to bargain: during the period before the enforcement of the Board's order the employer gets what he considers the economic benefit of the refusal to bargain (App. p. 117); when the employer is ordered to bargain with the union some years later, "the employer may reap a second benefit from his original refusal to comply with the law: he may continue to enjoy lower labor expenses after the order to bargain either because the union is gone or because it is too weak to bargain effectively" (App. p. 117).

The court below detailed the injuries imposed by a purely prospective type order on employees, the union, other employers who bargain in good faith and suffer an economic disadvantage (App. pp. 116-120), the Board and the courts whose administrative and judicial resources are drained and diverted by encouraging "frivolous litigation" (App. p. 118).

Analyzing pertinent statutory language and precedents in this and other courts, the court below held that

the Board had the power to order a make-whole remedy for the refusal to bargain in this case (App. p. 120). The court below found nothing in this Court's decision in *H. K. Porter Co.* v. *N.L.R.B.*, 397 U.S. 99 (1970) which impinged on the power of the Board to give the make-whole remedy which the court ordered the Board to consider. In this respect the court below stated (App. p. 124):

> "We in no way suggest either that the Board can compel agreement or that the make-whole remedy is appropriate under circumstances in which the parties would have been unable to reach agreement by themselves. Quite the contrary, we have specifically limited the scope of our remand first, to consideration of past damages, not to compulsion of a future contract term, and second, to relate to damages based upon a determination of what the parties themselves would have agreed to if they had engaged in the kind of bargaining process required by the Act. It is not within the scope of our remand for the Board to measure the amount of damages by reference to any contract term which could have been brought about only through a mandate to the employer not merely to engage in the process of collective bargaining but also to agree on a contract provision."

The court below accordingly enforced in full the order entered by the Board and at the same time remanded the Union's request for additional relief to the Board for further proceedings consistent with the court's opinion (App. p. 125). Judge MacKinnon concurred in the enforcement of the Board's order but dissented from the remand because he read this Court's decision in *H. K. Porter Co.* v. *N.L.R.B.*, 397 U.S. 99 (1970) as foreclosing the issue of the Board's power to

grant the requested make-whole remedy (App. pp. 130-131).

Prior petition for writ of certiorari in Tiidee I

Tiidee petitioned this Court (Case No. 654, O.T. 1970) for a writ of certiorari to review the decision of the court below in *Tiidee I*. The Union filed a brief in support of the petition for certiorari but the Board opposed on the ground that the issue "is not ripe for review." Explaining why the case should not be reviewed at this stage the Board in its Memorandum in Opposition (p. 3) stated "should the Board refuse the make-whole remedy in this case, its expressed reasons may satisfy the court of appeals" or "it may provide lesser alternative relief which neither party appeals or which the court concludes is adequate under the circumstances here." The Supreme Court denied the writ. *Tiidee Products, Inc.* v. *NLRB,* 400 U.S. 950.

Original decision of Board and court below in Tiidee II

All of the unfair labor practices occurring in 1967 were included in the complaint in *Tiidee I,* in which the hearing before the Trial Examiner took place on January 16-18, 1968 (App., pp. 1-2). Tiidee subsequent to the hearing in *Tiidee I* engaged in further unfair labor practices, which resulted in three additional charges which were tried by the Board and the Court in cases known as *Tiidee II*. The Board in *Tiidee II* found (App., pp. 47-82) and the court of appeals upheld all of its findings (App., pp. 132-135), that Tiidee engaged in the following additional unfair labor practices:

During 1968 Tiidee discriminatorily discharged five employees (App., pp. 56-69). One of these,

Tackett had been the Union observer and testified adversely to Tiidee in the hearing in *Tiidee I* (App., pp. 62-66). Her discharge was in retaliation against her for acting as a Union observer and appearing as a witness in the *Tiidee I* hearing and violated Section 8(a)(1), (3) and (4) (App., p. 66). Two others, Haywood and Wilson, had likewise been witnesses in *Tiidee I* and their discharges similarly violated 8(a)(1), (3) and (4) (App., pp. 56-58, 66-69).

By the time the hearing in *Tiidee II* took place on September 18 and 19, 1968 (App., p. 44) Tiidee had discriminatorily discharged or laid off thirteen out of the nineteen employees who voted for the Union (App. pp. 56-60, 62-69). A fourteenth employee who was discriminatorily discharged, Pauline Messer, had been hired for the first time subsequent to the election and signed a Union card (App., pp. 61-62).

Within a few days after the hearing on January 16-18, before the Trial Examiner in *Tiidee I* (App., p. 2), Tiidee instituted new hiring procedures and posted a set of work rules and regulations, prohibiting solicitation or distribution of literature on company premises and specifying a code of progressive discipline, with warnings for minor offenses, three-day layoff for major offenses and discharges for an intolerable offense (App., pp. 51-52, 69-70). Tiidee was motivated to post the rules by hostility to the Union (App., p. 52). These rules were repeatedly used discriminatorily by Tiidee to coerce the Union supporters (App., pp. 51-52, 69-70). Aside from their discriminatory motivation and discriminatory application and the inherent invalidity of the no solicitation and no distribution provisions (App., pp. 51-52), the posting

and implementation of these rules without first bargaining with the Union constituted an unlawful refusal to bargain because thereby Tiidee unilaterally changed the terms and conditions of employment in derogation of the certified status of the Union as bargaining representative (App., pp. 69-70).

The Union again requested that as a remedy for its unlawful refusal to bargain, the Board should order Tiidee to make whole employees for the wages and benefits which they lost as a result of Tiidee's refusal to bargain (App., p. 73). The Board again declined to grant this remedy (App. pp. 73). On the Union's petition for review filed in the court of appeals, the court sustained in full the Board's findings of fact, enforced its order and remanded to the Board to reconsider its remedy in accordance with the principles announced by the court of appeals in its opinion in *Tiidee I* (App. pp. 132-135).

Proceeding before Board and supplemental decisions on remands

The Board in each *Tiidee I* and *Tiidee II* notified the parties that it was accepting the remand and invited them to file statements of position (App. pp. 83-84, 98-99, 107-108). The Union filed statements of position in each case (App. pp. 84, 99) in which it proposed that the Board itself determine the losses suffered by the employees and the Union, on the basis of the record already before the Board, as supplemented by the attachments to the statement of position and such additional evidence as the employer might submit to the Board (App. pp. 84, 87). Alternatively the Union requested the Board to enter an order remanding the

cases to a Trial Examiner for a hearing for the purpose of determining what amount, if any, in dollars and cents is necessary to make whole each employee and the Union, for losses suffered because of the refusal to bargain (App. pp. 87-90).

The Board in each *Tiidee I* and *Tiidee II* refused to accept either of the alternatives proposed by the Union (App. pp. 87-90, 100). Instead the Board in each *Tiidee I* (App. pp. 83-97) and *Tiidee II* (App. pp. 98-108) held that it could not grant a make-whole remedy because to do so, "(i)nevitably the Board would have to decide * * * what the parties '*should* have agreed to' and this, the court stated, the Board must not do" (App. p. 87) (emphasis that of the Court of Appeals, see App. p. 122). The quoted language and the reference by the Board to what the Board "must not do" refer to the ruling of the Court of Appeals that the Board could measure the make-whole remedy "not by any sentiment as to what the parties *should* have agreed to, but only * * * what it is likely the parties would have agreed to" (App. p. 122).

In the Board's view the same lack of power to make-whole the employees for their losses, prevented the Board from entering an order requiring the employer to reimburse the Union for lost initiation fees and dues. The Board stated, "We view this claim as partaking of a request for a make-whole remedy * * * since presumably the dues and fees sought would have to come from lost wages" (App. p. 90).

To excuse its failure to grant a "make-whole" remedy, the Board also relied upon the difficulty of ascertaining "with even approximate accuracy what

the parties '*would* have agreed to' " (App. p. 87, emphasis in Board's quotation) and the "long delay" which would result from devising a "make whole" formula (App. p. 87).

The Union's request for an award of organizational expenses was denied on the ground that "the Union incurred no extraordinary organizational expenses because of Respondent's patently frivolous objection to the election and subsequent refusal to bargain" (App. p. 90).

The Board, however, did supplement its prior remedy with the following alternative remedies which the Board believed would "undo some of the baneful effects" of the employer's unfair labor practices (App. p. 88): mailing to the homes of employees copies of notice which accompanied the Board's order (App. 88); affording the Union access to bulletin boards in the plant for the posting of union notices, bulletins and other literature, together with the names and addresses of all employees for a one year period following the Board's Supplemental Decision (App. p. 89); and reimbursement of the Union and the Board for their expenses incurred in the investigation, preparation, presentation and conduct of these cases including costs and expenses of counsel fees, salaries, witness fees, transcript and record costs, printing costs, travel expenses and per diem, and other reasonable costs and expenses (App. p. 91).

On the remand in *Tiidee II,* the Board found that the employer's conduct in *Tiidee II* "was part of the same pattern of patently frivolous litigation for the same unlawful object" (App. p. 100) and required the

same additional remedies of mailing of notices to homes of employees and award of litigation costs to the Union and the Board (App., p. 100).

That the remedy provided was inadequate to undo the unfair labor practices committed by Tiidee was admitted by the Board (App. p. 88).

REASONS FOR GRANTING THE WRIT

Tiidee in its Petition for Writ of Certiorari Before Judgment (Case No. 73-1180) has asked this Court to review the question of the power of the Board to award litigation costs as part of its remedial orders. We agree that this is a question which should be reviewed by this Court but we urge that the review should encompass the whole issue of power to remedy a frivolously based refusal to bargain, as raised in the *Tiidee* cases now pending in the Court of Appeals for the District of Columbia Circuit, rather than the piecemeal taking by this Court of one aspect of that issue before judgment in the court below.

1. There is a crisis in the administration of the National Labor Relations Act which makes it imperative that this Court review at the earliest possible date the question of the power of the Board to issue a make-whole order to remedy a frivolous refusal to bargain.

The members of the National Labor Relations Board, including its present chairman, as well as the predecessor chairman of the Board, are agreed that if the Board does not have the power to grant a make-whole remedy, the Board lacks any effective means of enforcing Section 8(a)(5) of the Act. In *Ex-Cell-O Corp.*, 185 N.L.R.B. 107 (1970), the Board held that it did not have the power to grant a make-whole remedy for refusal to bargain. Chairman Miller, joining with

Board Members Fanning and Jenkins, who constitute a majority of the present Board, stated (185 N.L.R.B.), at p. 108:

> "We have given most serious consideration to the Trial Examiner's recommended financial reparations Order, and are in complete agreement with his finding that current remedies of the Board designed to cure violations of Section 8(a)(5) are inadequate. A mere affirmative order that an employer bargain upon request does not eradicate the effects of an unlawful delay of 2 or more years in the fulfillment of a statutory bargaining obligation. It does not put the employees in the position of bargaining strength they would have enjoyed if their employer had immediately recognized and bargained with their chosen representative. It does not dissolve the inevitable employee frustration or protect the Union from a loss of employee support attributable to such delay. The inadequacy of the remedy is all the more egregious where, as in the recent *N.L.R.B.* v. *Tiidee Products, Inc.*, case, * * * the employer had raised 'frivolous' issues in order to postpone or avoid its lawful obligation to bargain." (Footnote omitted.)

Predecessor Chairman McCulloch and predecessor Board Member Brown, dissenting in *Ex-Cell-O,* urged that the Board did have the power to give a make-whole remedy which the majority recognized was essential to make Section 8(a)(5) effective and pointed to the widespread recognition in the courts, Congress and academic circles, of the inadequacy of the remedies which the Board has traditionally used. The dissent stated (185 N.L.R.B.) at p. 115:

> "The present remedies for unlawful refusals to bargain often fall short, as in the present case, of adequately protecting the employees' right to bar-

gain. Recent court decisions, congressional investigations, and scholarly studies have concluded that, in the present remedial framework, justice delayed is often justice denied.

* * *

"A study by Professor Philip Ross shows that a contract is signed in most situations where the employer honors its duty to bargain without delay, but that the chance of a contract being signed is cut in half if the case must go to court enforcement of a bargaining order. In the interim, of course, the employees are deprived of their rightful union representation and the opportunity to bargain over their terms and conditions of employment, while at the same time their employers may gain a monetary advantage over their competitors who have complied with their legal duty." (Footnotes omitted)

The dissent cited (185 N.L.R.B., at 115, fn. 45) the Cox Advisory Panel's report to the Senate Committee on Labor and Public Welfare [5] and testimony given at the hearings before the Special Subcommittee on Labor in 1968. [6] In addition it could have cited the Report of the Special Subcommittee on Labor, Committee on Education and Labor, House of Representatives, 90th Cong., 2d Sess. (Comm. Print. p. 2) which stated:

"Employers who violate the law are encouraged to do so as the penalties come too late for effective enforcement, and in any event have little or no deterrent force."

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[5] Report pursuant to S. Res. 66 and S. Res. 141, 86th Cong., 2d Sess. 81 (1960).

[6] See testimony of Mozart G. Ratner during Hearings on Congressional Oversight of Administrative Agencies (NLRB) before the Subcommittee on Separation of Power of the Senate Committee in the Judiciary, 90th Cong., 2d Sess. Part 1, 1968, pp. 204, 214.

Similarly the Subcommittee on NLRB of the House Committee on Education and Labor, 87th Cong., 1st Sess., Report on Administration of the LMRA by the NLRB (Comm. Print., p. 2, 1961) stated:

> "A partial reason for the caseload, and hence the delay in unfair labor practice cases, lies in the inadequate remedies of the Labor Board. Labor Board orders constitute in many situations no more than a 'slap on the wrist'. They are too little and too late. They constitute, in the words of one witness, 'a license fee for union busting'. The subcommittee recommends that the Labor Board reconsider the problem of 'remedies' with an eye to taking the profit out of unfair labor practices."

The caseload to which the above quoted subcommittee report refers has increased, with respect to refusal to bargain cases, three-fold since the date of the report. Indeed the history of the increase in refusal to bargain cases before the Board during the past 15 years is the most startling evidence of the ineffectiveness of present remedies. In the fiscal year 1955-1956 there were 838 charges under Section 8(a)(5). The number doubled by 1959-1960, trebled by 1962-1963, quadrupled by 1964-1965 and, by 1971-1972, increased seven-fold, with the figure rising to 6,023. No later figures are available but it is a fair inference that they are even higher. The increase in orders to employers to bargain was even more striking. The 23 in 1956-1957, doubled by 1958-1959, increased ten-fold by 1964-1965 and fifteen fold by 1966-1967, when 366 orders to employers to bargain were issued.[7]

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[7] The following table is based on figures in the NLRB's Annual Reports. Page references in parenthesis are to the Annual Report issued by the NLRB for the year indicated in column 1, except that the figures without any parenthesis after them are taken from

the NLRB 12th Annual Report for the fiscal year ended June 30, 1947:

Fiscal Year	No. of charges alleging 8(a)(5)	No. of Decisions finding 8(a)(5)	No. of Cases closed by collective bargaining begun by employer
1935-1936	405 (p. 34)		
1936-1937	1,291 (p. 19)		
1937-1938	2,576 (p. 28)		
1938-1939	1,776 (p. 31)		923
1939-1940	1,253 (p. 15)		881
1940-1941	1,593 (p. 25)		1,009 (p. 36)
1941-1942	1,550 (p. 77)		1,032 (p. 87)
1942-1943	756 (p. 85)		493 (p. 94)
1943-1944	465 (p. 79)		136
1944-1945	507 (p. 81)		116 (p. 85)
1945-1946	1,241 (p. 76)		176 (p. 81)
1946-1947	1,347 (p. 68)		273 (p. 88)
1947-1948	789 (p. 99)		173 (p. 106)
1948-1949	1,070 (p. 159)		228 (p. 166)
1949-1950	1,309 (p. 222)		236 (p. 229)
1950-1951	1,235 (p. 294)		261 (p. 295)
1951-1952	1,226 (p. 281)		197 (p. 282)
1952-1953	1,347 (p. 95)		247 (p. 96)
1953-1954	1,212 (p. 157)		230 (p. 158)
1954-1955	1,213 (p. 161)	65 (p. 5)	135 (p. 162)
1955-1956	838 (p. 165)	54 (p. 2)	117 (p. 166)
1956-1957	827 (p. 163)	23 (p. 3)	91 (p. 164)
1957-1958	1,039 (p. 145)	26 (p. 3)	39 (p. 146)
1958-1959	1,311 (p. 163)	55 (p. 3)	49 (p. 164)
1959-1960	1,753 (p. 180)	53 (p. 12)	269 (p. 181)
1960-1961	1,676 (p. 220)	67 (p. 17)	319 (p. 221)
1961-1962	2,294 (p. 262)	157 (p. 18)	432 (p. 263)
1962-1963	2,584 (p. 164)	165 (p. 21)	548 (p. 165)
1963-1964	3,088 (p. 170)	175 (p. 23)	986 (p. 173)
1964-1965	3,815 (p. 180)	226 (p. 21)	1,022 (p. 183)
1965-1966	3,811 (p. 186)	326 (p. 23)	1,103 (p. 190)
1966-1967	3,819 (p. 218)	366 (p. 15)	1,282 (p. 222)
1967-1968	4,097 (p. 203)	332 (p. 15)	1,371 (p. 206)
1968-1969	3,967 (p. 199)	329 (p. 20)	1,244 (p. 202)
1970-1971	4,489 (p. 157)	244 (p. 18)	1,429 (p. 160)
1971-1972	6,023 (p. 225)	250 (p. 21)	1,510 (p. 228)

The problem of the ineffectiveness of the prospective-type order in refusal to bargain cases has received extensive notice in studies of administration of the National Labor Relations Act and the legal publications. [8]

Harvard Law School's Dean Derek Bok has indicated that continued scoffing at labor law because of the inadequacy of its remedies will cause the law to lose its "moral authority" and "the most serious consequences" will follow. [9]

Enforcement of the obligation to bargain collectively is crucial to the statutory scheme. *N.L.R.B.* v. *American National Insurance Company,* 343 U.S. 395, 402 (1952). Indeed it underlies our entire national policy. *Boys Market, Inc.* v. *Clerk's Union,* 398 U.S. 235, 251 (1970).

While the majority of the National Labor Relations Board in the *Ex-Cell-O* case, suggested that the remedy be sought in Congress, we submit that in an issue of such critical importance this Court should first pass on the question so that it will be clear whether Congressional action is necessary.

The language of the National Labor Relations Act, [10] as this Court has repeatedly held, constitutes a broad

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[8] The list is so lengthy that we have attached it as Appendix B to this petition, pp. 4a-5a *infra.*

[9] Derek Bok, The Regulation of Campaign Tactics in Representation Elections under the National Labor Relations Act, 78 Harv. Law Rev. 38, 59 (1964).

[10] Section 10(c) of the Act (29 U.S.C. 160(c)) provides: "[T]he Board shall * * * issue and cause to be served * * * an order * * * to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act."

mandate "to vindicate the public policy of the statute by making the employees whole for losses suffered on account of an unfair labor practice."[11] The wrongdoer's liability for "expected profits" lost during the period of the pendency of the litigation is an accepted feature of our judicial system. *Consolo* v. *Federal Maritime Commission,* 383 U.S. 607, 624-625 (1966); *N.L.R.B.* v. *Electric Vacuum Cleaner Co.,* 315 U.S. 685, 698 (1942). Nor has uncertainty as to the amount of the loss ever served to defeat recovery. *Bigelow* v. *R.K.O. Radio Pictures,* 327 U.S. 251, 264-265 (1946). It is urgent that this Court as soon as possible establish that these elementary principles can properly be applied to make whole losses suffered as a result of a frivolous refusal to bargain.

2. The crisis in enforcement of the National Labor Relations Act has been deepened by the Board's refusal to seek injunctive relief under Section 10(j) in refusal to bargain cases, no matter how frivolous

In its decision in *Ex-Cell-O Corp.,* 185 N.L.R.B. 107, 110 (1970) the Board stated that the problem of delay in refusal to bargain cases would be met by the "full resort to the injunctive provisions of Section 10(j) and (e) of the Act". However, the same concern which the Board expressed in its *Ex-Cell-O* decision that a make-whole remedy would unfairly dilute the procedural right of an employer to litigate the validity of

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[11] *Nathanson* v. *N.L.R.B.,* 344 U.S. 25, 27 (1952); *N.L.R.B.* v. *Rutter Rex Mfg. Co.,* 396 U.S. 258, 262 (1969); *Phelps Dodge Corp.* v. *N.L.R.B.,* 313 U.S. 177, 197 (1941); *National Licorice Co.* v. *N.L.R.B.,* 309 U.S. 350, 362-363 (1941); *Amalgamated Utility Workers* v. *Consolidated Edison Co.,* 309 U.S. 261-265 (1940).

a certification of representatives (185 N.L.R.B. at 109) has now been elevated by the Board into a bar to injunctive relief in any case where the refusal to bargain is based on the employer's asserted desire to litigate the validity of the certification. In *John Singer, Inc.*, 197 N.L.R.B. No. 7, 80 LRRM 1340 (May 25, 1972), the Board found the refusal to bargain was based on frivolous grounds but nevertheless, in order to preserve undiminished the employer's right to litigate the issue, directed the General Counsel, in applying for preliminary injunctive relief under Section 10(e) as to other unfair labor practices, not to apply for injunctive relief as to the refusal to bargain. The Board stated (80 LRRM at 1341):

> Clearly, no meaningful bargaining can take place when at the same time the Respondent is contesting its bargaining obligation.

In accordance with the principles stated in the *John Singer* case, we understand that the Board is not applying for preliminary injunctions in any cases of a refusal to bargain based on a stated intention to litigate the validity of a certification.

Congress, both in the original enactment of the Act,[12] and by rejection of amendments proposed in 1947[13] to make certifications subjects to direct judicial

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[12] Congress at the time it enacted the Act in 1935 deliberately refrained from providng any direct judicial review of certifications or bargaining representatives because "[t]his endlessly delays the beginning of collective bargaining". 93 Cong. Rec. 3446, reprinted 1 Leg. His. NLRA 653.

[13] For the full legislative history of efforts to make certifications subject to direct review see Sen. Rep. No. 573 Committee on Education and Labor, 74th Cong. 1st Sess., pp. 5-6, 14, reprinted

review, clearly manifested the Congressional intent that employers should not be able to test the validity of certifications without liability for losses suffered during the period of litigation. The posture of the Board in both its refusal to award a make-whole remedy and its refusal to apply for temporary injunctions under Section 10(e) and (j) flies in the face of the scheme of the Act as envisioned by Congress.

Because of the crisis in enforcement of the Act which this misinterpretation of the statute is occasioning, immediate review by this Court is urged.

3. The court below has issued a full opinion stating its views on all questions presented

Unlike most cases in which review is sought before judgment below, the court below has issued a lengthy, carefully considered, well annotated opinion ruling on all of the questions here presented (App. pp. 114-125). Hence the absence of judgment below in the cases when they returned to the court following the remand, is of little, if any, relevance to the grant of review by this Court at this time.

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2 Leg. His. NLRA 2304, 2314; House Rep. No. 1147, Committee on Labor, 74th Cong., 1st Sess. pp. 6-7, 23 reprinted 2 Leg. His. NLRA 3052-3053, 3073; 79 Cong. Rec. 7658, reprinted 2 Leg. His. NLRA 2370. The Hartley Bill in 1947 was reported out of Committee with a provision for a direct review of certifications. See House Rep. No. 245, 80th Cong., 1st Sess. p. 43, reprinted 1 Leg. His. LMRA 334. Congress, however, rejected this amendment in order not to permit any interference with the duty to begin collective bargaining as soon as the union is certified. See Conference Report, House Rep. No. 510, 80th Cong., 1st Sess., pp. 56-57, reprinted 1 Leg. His. LMRA 560-561; 93 Cong. Rec. 6444.

CONCLUSION

For the foregoing reasons it is urged that this petition be granted. However, if the Court does not grant this petition for review, we urge that the petition in Case No. 73-1180 be denied.

Respectfully submitted,

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March 22, 1974

APPENDIX A

The National Labor Relations Act, 61 Stat. 146, 73 Stat 544, as amended, 29 U.S.C. 151, *et seq.*, insofar as here relevant, provides:

Unfair Labor Practices

Sec. 8. (a) It shall be an unfair labor practice for an employer—

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a).

* * *

Representatives and Elections

Sec. 9. (a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: * * *

(c)(1) Whenever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board—

* * *

(A) by an employee or group of employees or any individual or labor organization acting in their behalf alleging that a substantial number of employees (i) wish to be represented for collective bargaining and that their employer declines to recognize their representative as the representative defined in section 9(a) * * *

the Board shall investigate such petition and if it has reasonable cause to believe that a question of rep-

resentation affecting commerce exists shall provide for an appropriate hearing upon due notice. * * * If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof.

* * *

PREVENTION OF UNFAIR LABOR PRACTICES

Sec. 10 (a) The Board is empowered, as hereinafter provided to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. * * *

* * *

(b) Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof. * * *

* * *

(c) The testimony taken by such member, agent, or agency or the Board shall be reduced to writing and filed with the Board. * * * If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act: * * *

* * *

(e) The Board shall have power to petition any court of appeals of the United States, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file in the court the record in the proceedings, as provided in section 2112 of title 28, United States Code.

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(j) The Board shall have power, upon issuance of a complaint as provided in subsection (b) charging that any person has engaged in or is engaging in an unfair labor practice, to petition any district court of the United States (including the District Court of the United States for the District of Columbia), within any district wherein the unfair labor practice in question is alleged to have occurred or wherein such person resides or transacts business, for appropriate temporary relief or restraining order. Upon the filing of any such petition the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper.

APPENDIX B

The following articles all recognize the issue of the power of the Board to make whole employees for losses suffered as the result of a refusal to bargain as an important unsettled issue:

American Bar Ass'n, Report of Section on Labor Relations Law, Development of Law Under the National Labor Relations Act—1968, p. 121 (ABA 1969)

Baier, Paul R., Rights Under a Collective Bargaining Non-Agreement: The Question of Monetary Compensation for a Refusal to Bargain, J. Urban L. 47:253 (1969-1970)

~~Beaird, J. R., Plagay, M. A., Whether the Nixon Board?, Ga. L.Rev. 667-68 (Summer 1970)~~

Bok, The Regulation of Campaign Tactics in Representation Elections Under the NLRA, 78 Harv. L.R. 38, 127-128 (1964)

Boston College Industrial & Commercial L.R. 1173-1250, 7/73 1972-1973 annual survey of labor relations law

Buffalo L.Rev. 17:830, 837-840 (Sp. 1968), Recent developments in the creation of effective remedies under the National Labor Relations Act

Fanning, John H., New and novel remedies for unfair labor practices, Ga. L.Rev. 3:253 (Winter 1969)

Fanning, John H., Proposals to Speed Taft-Hartley Act Cases, BNA 1970 Labor Relations Yearbook 157, 160 (BNA 1971)

Fuchs, Robert S., and Kelleher, Henry M., The Back-Pay Remedy of the National Labor Relations Board, 9 Boston College Ind. and Comm. L.Rev. 829, 885 (1968)

56 Geo. Law Journal 474, 514 (Jan. 1968), Note: Monetary Compensation as a Remedy for Employer Refusal to Bargain

Gross, James A., Economics, Politics and the Law: The NLRB's Division of Economic Research, 1935-1940, 55 Cornell Law Rev. 321, 344-345, fn. 111 (Feb. 1970)

83 Harv. L.Rev. 1732 (May 1970), Remedies: NLRB has authority to order retroactive payments of fringe benefits where employer wrongfully refuses to sign contract

84 Harv. L.Rev. 1670, 1672-1674 (May 1971), Note: NLRB Power to Award Damages in Unfair Labor Practice Cases

19 Kan. L.Rev. 325 (Winter 1971), Note, the *Ex-Cell-O* and *Tiidee Products* Cases—Continuing Controversy Over The Make-Whole Remedy in Refusal to Bargain Cases

McCulloch, Past, Present and Future Remedies Under Section 8(a)(5) of the NLRA, 19 Lab. Law J. 131, 141 (1968)

McGuiness, Is The Award of Damages For Refusals to Bargain Consistent With National Labor Policy, 14 Wayne L.Rev. 1086 (1968)

67 Mich. L.Rev. 374 (1968), Note: An Assessment of the Proposed 'Make-Whole' Remedy in Refusal to Bargain Cases

Miller, Edward B., "First Impressions" of the New NLRB Chairman, BNA 1970 Labor Relations Yearbook 206, 211 (BNA 1971)

65 North Western Univ. Law Rev., 441, 445 (July-August 1970) NLRB Remedial Orders: a permissible voice in substantive collective bargaining

Ordman, A., National Labor Relations Act: Current developments, New York Univ. Conf. on Labor 24:115 (1971)

Parker, G. P., Employee reimbursement for an employer's refusal to bargain: the Ex-Cell-O (Case No. 25-CA-2377) Mar. 1, 1967) doctrine, Tex. L. Rev. 46:758 (April 1968)

Ross, Philip, Analysis of Administrative Process Under Taft-Hartley, BNA 1966 Labor Relations Yearbook, p. 299 (BNA 1967)

Rutgers Camden Law Journal 3:272 (Fall 1971), Analysis of the NLRB's objections to a make-whole remedy in refusal to bargain cases

Schlossberg, Stephen I., Silard, John, The Need for a Compensatory Remedy in Refusal-to-Bargain Cases, Wayne L.Rev. Vol. 14, No. 4, p. 1059, 1968

St. Antoine, A Touchstone for Labor Board Remedies, 14 Wayne L.Rev. 1039 (1968)

Summers, Clyde W., Collective Bargaining Agreements and the Law of Contracts, 58 Yale Law Journal 525, 572 (March 1969)

Tex. L.Rev. 46:758 (April 1968), Comment, Employee Reimbursement for an Employer's Refusal to Bargain: the Ex-Cell-O Doctrine, 46 Tex. L.Rev. 758, 762 (1968)

35 University of Chicago L.Rev. 777, 787 (1968), Comment, Employer's Refusal to Bargain and the NLRB's Remedial Powers: The *H. K. Porter* Case

Wolkinson, Benjamin, The Remedia Efficacy of NLRB Remedies in *Joy Silk Cases,* 55 Cornell Law Rev. 1, 36 (Nov. 1969)

Zappacosta, Jack J., An Analysis of the NLRB's Objections to a Make-Whole Remedy in Refusal-To-Bargain Cases, 3 Rutgers Camden Law Journal 272 (Fall 1971)

In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1180

TIIDEE PRODUCTS, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, ET AL.

No. 73-1423

INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, ET AL.

ON PETITIONS FOR WRITS OF CERTIORARI BEFORE JUDGMENT TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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1. a. In its original decision in *Tiidee I*[1], the Board found that the Company, in resisting the organizational drive of the International Union of

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[1]Two Board decisions, hereafter *Tiidee I* and *Tiidee II*, were consolidated for purposes of review in the court of appeals.

Electrical, Radio and Machine Workers, AFL-CIO, at its Dayton, Ohio, plant, violated Section 8(a)(1) and (3) of the National Labor Relations Act by interrogating employees about their union activities, by raising production quotas, and by discharging and laying off certain employees because of their support for the Union. The Board also found that the Company violated Section 8(a)(5) and (1) of the Act by refusing to bargain with the Union, which had been certified by the Board as the representative of its employees following a Board-conducted election, and by refusing to supply the Union with requested information necessary for it to bargain intelligently (Pet. App. 34-35).[2] The Board ordered the Company, *inter alia,* to cease and desist from the unfair labor practices found, to reinstate the discharged employees, and to bargain with the Union (Pet. App. 38-44). The Board declined the Union's request for broader remedial relief (Pet. App. 37-38, 45-46).[3] The court of appeals enforced the Board's order, but remanded the case to the Board for further consideration of the Union's request for additional relief (Pet. App. 110-131).

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[2]"Pet. App." refers to the appendix to the petition in No. 73-1180.

[3]The Union requested, *inter alia,* that the Company make the employees whole for wages and other benefits which they might have received but for the Company's unlawful refusal to bargain, and pay the Union the amount of dues and initiation fees it lost as a result of that refusal.

b. On the remand, the Board granted some of the additional relief requested by the Union, including the requirement that the Company reimburse the Board and the Union for litigation expenses, including attorneys' fees (Pet. App. 90-92). The Board noted that, in *Heck's, Inc.*, 191 NLRB 886, 889,[4] it had ruled that normally litigation expenses are not recoverable in a Board proceeding. It concluded that a departure from this rule was warranted in the case of "frivolous litigation such as this is", since the "policy of the Act to insure industrial peace through collective bargaining can only be effectuated when speedy access to uncrowded Board and court dockets is available" (Pet. App. 90-91).

The Board denied the Union's request to make the employees whole for monetary losses suffered as a result of the Company's unlawful refusal to bargain (the "make-whole" remedy). Accepting as the "law of the case" the view of the court of appeals that the Board has authority to grant such remedy (Pet. App. 85), the Board concluded that it would not be "practicable" to do so in light of "the record herein." The Board found that the record provided "no way by which the Board could ascertain with even approximate accuracy * * * what the parties '*would* have agreed to' if they had bargained in good faith." (Pet. App. 87, emphasis in original.) The Board added that it would "further delay the commencement of meaningful collective bargaining" to remand the case to a Trial Examiner for a hearing to devise a " 'make-whole' formula for backpay to be awarded employees, if any." For, the Company, "which is under order to bargain with the Union, is not likely to

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[4]This case is before the Court in *National Labor Relations Board v. Food Store Employees Union, Local* 347, No. 73-370.

agree upon any new wage benefits for employees for fear that the Board would give them retroactive effect in devising a backpay formula for the past refusal to bargain" (Pet. App. 87-88).

Thereafter, in *Tiidee II*, which involves further unfair labor practices committed by the Company after the events covered in *Tiidee I*, the Board followed the same course. It awarded litigation expenses, but declined the Union's request for a make-whole remedy (Pet. App. 101-102).

c. Petitions to review the Board's supplemental orders in *Tiidee I* and *II* were filed in the court of appeals by both the Company and the Union, and the Board filed a cross-petition for enforcement of those orders. The Company contested the orders on the ground, *inter alia*, that the Board lacks statutory authority to award litigation expenses even in frivolous cases. The Union challenged the Board's action in refusing to provide the make-whole and other remedies which it requested. The court of appeals heard argument in the cases on September 24, 1973, and they are awaiting its decision.

2. In No. 73-1180, the Company, in advance of judgment, seeks to have this Court decide the question which it has presented to the court of appeals—*i.e.*, whether Section 10(c) of the Act, 29 U.S.C. 160(c), empowers the Board to order a respondent to reimburse the Board and the charging party for expenses incurred in the investigation, preparation, and conduct of an unfair labor practice case (Pet. 3).[5] In No. 73-1423, the Union, like-

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[5]The Company also seeks to present the further question whether, assuming the existence of such power, the Board was reasonable in awarding litigation expenses subsequent to the date when the Company offered to comply with its obligations under the Act (Pet. 3).

wise in advance of judgment, seeks to have this Court decide the question which it has presented to the court of appeals—*i.e.*, whether the Board has power to make the employees whole for losses suffered as a result of an unlawful refusal to bargain with their union representative (Pet. 3).[6]

The issues presented by the petitions are not "* * * of such imperative public importance as to justify the deviation from normal appellate processes and to require immediate settlement in this court" prior to judgment in the court of appeals. Rule 20 of the Rules of this Court.[7] The question the Company raises—whether the Board has power to award litigation expenses—was not raised by either the Board or the Union in this Court in *National Labor Relations Board* v. *Food Store Employees Union, Local 347*, No. 73-370, argued March 18-19, 1974, and therefore is not properly before the Court in that case. See the Board's supplemental brief in that case, pp. 1-5. Moreover, *Tiidee I* and *II* were argued in the court of appeals on September 24, 1973 and that court may be holding its decision pending this Court's decision in *Food Store*

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[6]The Union also seeks to present these further questions: (1) whether, assuming that the Board has power to provide a make-whole remedy, it abused its discretion in failing to order it here; (2) whether it erred in failing to reimburse the Union for the initiation fees and dues which it could have collected upon the signing of an agreement by the Company; and (3) whether the Board erred in failing to reimburse the Union for excess organizational expenses (Pet. 3-4).

[7]The power of this Court to review determinations of administrative agencies before judgment in the court of appeals has never been definitively settled. See Stern and Gressman, *Supreme Court Practice*, pp. 28-30 (4th ed. 1969). Although we believe it has that power, for the reasons given in the text this would not be an appropriate occasion to exercise it.

Employees. Although the issue of Board power is not presented therein, this Court's opinion in *Food Store Employees* may nonetheless provide some guidance to the court of appeals on that issue, and that court should be afforded an opportunity to consider the *Tiidee* cases in light of this Court's opinion.

The Union, agreeing that the issue presented by the Company should be reviewed by this Court, has filed a petition asking this Court to review "the whole issue of power to remedy a frivolously based refusal to bargain" (Pet. 17), including the Board's power to grant a "make-whole" remedy. As indicated above, review of the issue presented by the Company is not warranted. Moreover, the general issue stated by the Union's petition is not presented in these cases. The court of appeals assumed that the Board had the power to grant the remedies requested by the Union, and left it to the Board to decide which were appropriate (Pet. App. 124-125); the sole question before that court is whether the Board's order on remand complies with the court's earlier decision. That is an issue on which it is particularly appropriate that the court of appeals speak first, and indeed one which, ordinarily, this Court would not review.

In short, neither the petition of the Company nor that of the Union warrants by-passing the normal appellate procedure of court of appeals review of agency determinations.

The petitions for writs of certiorari should be denied.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

PETER G. NASH,
General Counsel,
National Labor Relations Board.

APRIL 1974.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1180

TIIDEE PRODUCTS, INC.,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

No. 73-1423

INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI BEFORE JUDGMENT TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

SUPPLEMENT TO PETITION FOR WRIT OF CERTIORARI BEFORE JUDGMENT IN No. 73-1180 and OPPOSITION TO PETITION FOR WRIT OF CERTIORARI BEFORE JUDGMENT IN No. 73-1423

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1180

TIIDEE PRODUCTS, INC.,

Petitioner,

vs.

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No. 73-1423

INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO,

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ON PETITION FOR WRIT OF CERTIORARI BEFORE JUDGMENT TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

SUPPLEMENT TO PETITION FOR WRIT OF CERTIORARI BEFORE JUDGMENT IN No. 73-1180 and OPPOSITION TO PETITION FOR WRIT OF CERTIORARI BEFORE JUDGMENT IN No. 73-1423

Both Tiidee Products, Inc. ("Tiidee" or "the Company") and the International Union of Electrical, Radio and Machine Workers, AFL-CIO ("the Union") have filed petitions for writs of certiorari before judgment seeking to review the supplemental decisions and orders of the National Labor Relations Board in the instant cases. On April 25, 1974, subsequent to the filing of these petitions, the United States Court of Appeals for the District of Columbia Circuit issued its opinion in this matter which is appended hereto. That decision dramatically underscores the importance of the questions presented for review by Tiidee and the integral relationship of such issues to those presently before this Court in *NLRB* v. *Food Store Employees Union, Local 347, Amalgamated Meat Cutters and Butcher Workmen of North America* ("*Food Store Employees*"), No. 73-720.[1] The decision of the Court of Appeals also removes any need to review the separate matters raised by the Union in No. 73-1423.

1. The Company's petition in No. 73-1180 urged that review by this Court was appropriate to consider the basic question underlying *Food Store Employees, viz.*, whether either the Board or the courts have authority to order a respondent in a proceeding under the National Labor Relations Act, 29 U. S. C. Section 141, *et seq.* ("the Act"), to reimburse the Board and/or a charging party for attorney fees and other litigation costs. Both the Board and the Respondent in *Food Store Employees* have argued that case did not properly present this threshold question but, rather, only concerned the secondary problem of whether, *assuming* that such a cost remedy may be awarded under the Act, the Court of Appeals could permissibly direct the Board to grant such relief. See, e.g., the Board's supple-

1. The Clerk of the Court of Appeals has requested (App., p. A27) that the Board "file a proposed judgment consistent with the enclosed opinion pursuant to the provisions of Rule 19 of the Federal Rules of Appellate Procedure", and it is expected that such a judgment will be settled by the court shortly. At such time, if this Court has not acted upon the petition in No. 73-1180, Tiidee requests that the petition be considered as a petition for writ of certiorari.

mental brief in *Food Store Employees*, p. 3. ("This Court . . . has decided issues presented by the parties without reaching underlying issues that the parties did not raise"). In order to avoid piecemeal and perhaps even unnecessary adjudication (cf. e.g., *Moore* v. *Mead's Fine Bread*, 348 U. S. 115 (1954)), therefore, Tiidee suggested that the issues presented in No. 73-1180 should be considered in conjunction with those raised in *Food Store Employees* or, alternatively, that any decision in *Food Store Employees* should be postponed until after resolution of Tiidee's petition under the procedure followed in *Red Lion Broadcasting Co., Inc.* v. *F. C. C.*, 390 U. S. 916 (1968), and 393 U. S. 1014 (1969). See pet. for cert. in No. 73-1180, pp. 9-11 and n. 11. The need for this approach was reemphasized, it is submitted, by this Court's serious concern during the argument of *Food Store Employees* as to whether the underlying issue of the Board's *power* to award attorneys' fees was properly before it for consideration. See transcript of oral arg. in No. 73-370, pp. 7-12.

The decision of the Court of Appeals in the instant cases forcefully reinforces the merits of Tiidee's petition. That opinion makes it abundantly clear that *Food Store Employees* has precluded any challenge in the District of Columbia Circuit—the circuit in which a petition for review under section 10(f) of the Act may be filed from *any* final order of the Board —as to the Board's authority to award attorney fees and reimbursement of litigation costs; that, although the Board's order here required modification, the court below was "bound as to the law", whatever the wisdom of that law, by *Food Store Employees*. App., pp. A5-A6, A10, A11, A13 and A14, n. 22, and Judge MacKinnon's comments following fn. 13 at App., pp. A7-A10. Reconsideration in the District of Columbia Circuit now foreclosed, the instant issue is one that is likely to be repeatedly litigated until resolved by this Court. The present posture of *Food Store Employees* in this Court, however, precludes review of the merits of this "law". Even the Court of Appeals found "somewhat disturbing [the] circularity of this

approach—the Board reacted to the strong remand in *Tiiddee I* by imposing attorney fees, *Food Store* then relied on the Board's supplemental decision in *Tiidee I* after our remand, and now we, in *Tiidee III*, rely in large part on the precedent established by *Food Store* to sustain the imposition of attorney fees and other litigation expenses." App., p. A10, n. 16. Granting the petition in No. 73-1180 would remove this undesirable decisional impediment and permit this Court to resolve all aspects of the question.

2. As Judge MacKinnon's separate views in the decision below demonstrate, the Board's authority to award attorney fees under the Act is, at the very least, subject to grave question. Thus, as Judge MacKinnon observes, and as argued in the Company's petition (pp. 11-14), justification for such an award cannot be premised on either the language of the Act, the Board's asserted equitable powers or even the underlying policies of the statute.[2] Since such an award has never before been granted, prior to *Food Store Employees* and the instant case, in the 39-year history of the Act, and may well "greatly increase", rather than decrease, "the number and complexity of cases before the Board . . . and add greatly to the Board's burdens", Judge MacKinnon correctly insisted upon "a more clearly expressed statutory mandate" or, as Tiidee requests, approval by this

2. As Judge MacKinnon notes, the National Labor Relations Act does not contain the requisite "unambiguous and specific [authorization] language consciously selected by Congress in other statutes"; an "administrative agency possess no . . . inherent equitable powers"; the legislative history of the Act" strongly suggest that the Congress never intended the Board to possess the power to impose attorney fees and other litigation expenses"; and that it would "be unsound policy to invest the Board with the power to grant attorney fees." App., pp, A7-A10. Judge MacKinnon further observes that there is a substantial question whether, in fact, Tiidee engaged in any "frivolous" conduct in this case and "that the Company [may well have] had legitimate grounds" for its actions. App,, A10 through A12. And finally, Judge MacKinnon observes that, in his opinion, an award of attorney fees and other litigation expenses "arguably falls within the ambit of *Republic Steel Corp.* v. *NLRB*, 311 U. S. 7 (1940)", which, precludes "the use of a pure deterrent rationale as a basis for upholding [Board] orders . . ." App., p. A14, n. 22 and p. A16.

Court, "to authorize the Board to order a remedy in which even the courts seldom indulge." See Judge MacKinnon's comments following fn. 13 at App., pp. A7-A10.

3. The Union's petition in No. 73-1423, which raises the separate question of whether the Board can issue a so-called "make-whole" remedy, has been obviated by the decision below. The Board had already decided that it did not possess such power. See *Ex-Cell-O Corp.*, 185 N. L. R. B. 107 (1970) and App. to Pet. in 73-1180, p. 85. And the court below, which is the only court of appeals that has ever suggested that the Board possesses such novel authority (see *Culinary Alliance and Bartenders Union, Local 793* v. *N. L. R. B.*, 488 F. 2d 664, 666 (9th Cir. 1974), has now agreed with the Board that, at least in this case, the limits of such a remedy could not even be approximated, that here "the parties might not have reached any agreement at all", that such relief was "not practical", and that it "would not effectuate the policies of the Act . . ." Since "the Board's refusal to grant a "make-whole" remedy was thus not "without substantial support in the evidence" the Court of Appeals correctly determined that it was "not disposed to overturn" that finding. App. pp. A19-A22. The issue presented by the Union has, accordingly, now been rendered academic and not worthy of review by this Court.

For the foregoing reasons, as well as those set forth by the Company in its petition, it is respectfully urged that the petition in No. 73-1180 be granted and the petition in No. 73-1423 be denied.

Respectfully submitted,

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APPENDIX

Notice: This opinion is subject to formal revision before publication in the Federal Reporter or U. S. App. D. C. Reports. Users are requested to notify the Clerk of any formal errors in order that corrections may be made before the bound volumes go to press.

UNITED STATES COURT OF APPEALS

For the District of Columbia Circuit

No. 72-1080

INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent,

TIIDEE PRODUCTS, INC.,

Intervenor.

No. 72-1365

INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent,

TIIDEE PRODUCTS, INC.,

Intervenor.

A2

No. 72-1691

TIIDEE PRODUCTS, INC.,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent,

INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO,

Intervenor.

No. 72-1692

TIIDEE PRODUCTS, INC.,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent,

INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO,

Intervenor.

ON PETITIONS FOR REVIEW AND CROSS-APPLICATIONS FOR ENFORCEMENT OF AMENDED ORDERS OF THE NATIONAL LABOR RELATIONS BOARD

Decided April 25, 1974

Ruth Weyand, with whom *Winn Newman* and *Melvin Warshaw* were on the brief, for petitioner in Nos. 72-1080 and 72-1365 and Intervenor in Nos. 72-1691 and Nos. 72-1692.

Lawrence M. Cohen, with whom *Roy E. Browne* was on the brief, for petitioner in Nos. 72-1691 and 72-1692 and Intervenor in Nos. 72-1080 and 72-1365. *Alan Raywid* also entered an appearance for Tiidee Products, Inc.

William H. DuRoss, III Attorney, National Labor Relations Board, with whom *Patrick Hardin*, Associate General Counsel, *Marcel Mallet-Prevost*, Assistant General Counsel, and *Abigail Cooley Baskir*, Attorney, National Labor Relations Board, were on the brief for respondent.

Before TAMM, MACKINNON and ROBB, *Circuit Judges*,

Opinion for the court filed by *Circuit Judge* MACKINNON.

MACKINNON, *Circuit Judge*: In these consolidated cases we are called upon to review[1] supplemental decisions and amended orders of the National Labor Relations Board (the Board) entered pursuant to our remands in *Tiidee I*[2] and *Tiidee II*.[3] The facts of these cases are fully stated in the prior Board[4] and court decisions. The remands in *Tiidee I* and *II* were based upon the contention of the International Union of Electrical, Radio and Machine Workers, AFL-CIO (the Union) that extraordinary affirmative relief was required to undo the effects of what the court termed Tiidee Products, Inc.'s (the Company) flagrant refusals to bargain, and its subsequently frivolous litiga-

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1. The Union and the Company seek review of certain portions of the supplemental decisions and amended orders, while the Board has cross-applied for enforcement of its amended orders. Our jurisdiction rests upon sections 10(e) and 10(f) of the National Labor Relations Act, 29 U. S. C. § 160(e), (f) (1970).

2. International Union of Electrical, Radio and Machine Workers, AFL-CIO v. NLRB, 138 U. S. App. D. C. 249, 426 F. 2d 1243, *cert. denied*, 400 U. S. 950 (1970).

3. International Union of Electrical, Radio and Machine Workers, AFL-CIO v. NLRB, 142 U. S. App. D. C. 270, 440 F. 2d 298 (1970).

4. *Tiidee I*: Tiidee Products, Inc., 174 NLRB 705 (1969); Tiidee Products, Inc. (Supp. Decision), 194 NLRB 1234 (1972). *Tiidee II*: Tiidee Products, Inc., 176 NLRB 969 (1969); Tiidee Products, Inc. (Supp. Decision), 196 NLRB 158 (1972).

tion.[5] The Board's orders here under review provide certain additional relief requested by the Union, but do not go as far as the Union would have them. As modified by this opinion, the Board's orders will be enforced.

I

In *Tiidee I* this court held that the Company violated section 8(a)(5) of the National Labor Relations Act (the Act), 29 U. S. C. § 158(a)(5) (1970), by what the majority opinion variously characterized as a "brazen refusal to bargain," a "manifestly unjustifiable refusal to bargain" and a "clear and flagrant violation of the law."[6] It then attempted to defend its action before the trial examiner and the Board[7] on the basis of what the *Tiidee I* court found to be a violation of the express terms of the Agreement for Consent Election and "patently frivolous"[8] objections to the election by which the Union had obtained certification as the exclusive bargaining representative of the unit employees.

The relief ordered in the original Board proceedings in light of the section 8(a)(5) and other unfair labor practices included a broad cease and desist order, and required the Company to post appropriate notices, bargain collectively with the Union upon request, furnish the Union with certain requested information on current wages and fringe benefits, and reinstate with back pay employees laid off and discharged because of their union activities. These conventional remedies were found by

5. These decisions are binding upon this panel and partially determine our disposition of this appeal.

6. *Tiidee I, supra* note 2, at 255, 256, 254, 426 F. 2d at 1249, 1250, 1248.

7. The Company conceded the section 8(a)(5) violations on review before the *Tiidee I* court. It also conceded some of the section 8(a)(2) violations but resisted the findings and remedies dealing with other alleged violations. *Tiidee I, supra* note 2, at 252, 426 F. 2d at 1246.

8. *Tiidee I, supra* note 2, at 254, 426 F. 2d at 1248.

the *Tiidee I* court to be an inadequate means of insuring meaningful bargaining and to reward[9] unjustly the Company for its illegal actions during the delay of litigation and enforcement of the Board's orders. The case was thus remanded to the Board for further consideration of the Union's make-whole claim and other additional or alternative forms of relief. *Tiidee II* involved further section 8(a)(5) violations, as well as other unfair labor practices, and again the case was remanded for further consideration of more appropriate remedies in light of the *Tiidee I* decision.

In the supplemental decisions and orders here under review, entered under the compulsion of our prior decisions, the Board finally ordered some additional affirmative remedies for the section 8(a)(5) violations in both *Tiidee I* and *II* but again declined to order any broad make-whole relief. The Board thus denied payment to employees for the difference between wages and benefits actually received and what the Union contended they would have received had the Company bargained in good faith to agreement on a contract with the Union. Similarly, the Board denied the Union's request that it be reimbursed for allegedly "lost" dues and fees, and organizational expenses. The Board did, however, order the Company to reimburse the Board and the Union for all litigation expenses, including attorney fees, in connection with the section 8(a)(5) issues in both Tiidee *I* and *II*.[10]

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9. It is a reward only if one considers that increased benefits were certain to be obtained by the Union. Such a result, however, was uncertain and remains so to this day. Thus, it is not strictly accurate to say that the Company profited or was rewarded by the delay.

10. The Board stated it was unable to allocate litigation expenses between the section 8(a)(5) and other violations in *Tiidee II* and thus granted reimbursement for all such expenses. Tiidee Products, Inc., 196 NLRB at 159 n. 7 (1972); Jt. App. at 127 n. 7. We think this finding is untenable and therefore the Board shall be required to determine the proper allocation of litigation expenses related to the section 8(a)(5) violations. *See* text following note 30 *infra*.

Additionally, the Company was ordered to mail copies of the Board's posted notices to the home of each employee in the bargaining unit, permit Union access to the Company's bulletin boards and other places where notices to employees are posted so it could post Union notices and other literature during the ensuing period of contract negotiations, and furnish the Union with a list of names and addresses of its employees and to keep the list current for a period of one year. As to these latter affirmative actions required of the Company, we fully agree with the Board's finding that they are necessary and appropriate to guarantee that rights conferred by section 7 will not be denied.[11]

II

In the supplemental proceedings in both *Tiidee I* and *II*, the Board ordered the Company to "[p]ay to the Board and the Union the costs and expenses incurred by them in the investigation, preparation, presentation, and conduct of these cases before the National Labor Relations Board and the courts . . . ."[12] Apparently the Board ordered this remedy in response to the *Tiidee I* court's suggestion that

> [t]he scope of the Board's consideration on remand, if it is deemed that the Union's proposal goes too far, would include consideration of such lesser, alternative remedies as an award to the Union . . . for the costs of having to litigate a frivolous case . . . .[13]

The Company vigorously contests the power of the NLRB to order the award of attorney fees and other litigation expenses to the Board and the Union, but that issue was recently settled in this circuit in *Food Store Employees Union, Local No. 347 Amalgamated Meat Cutters* v. *NLRB*, 155 U. S. App. D. C. 101, 476 F. 2d 546, *cert. granted*, 94 S. Ct. 567 (1973), which held that the Board does have the power in appropriate cases

11. Tiidee Products, Inc., 194 NLRB 1234, 1235-36 (1972).
12. *Id.* at 1237; 196 NLRB 158, 159.
13. 138 U. S. App. D. C. at 259 n. 15, 426 F. 2d at 1253 n. 15.

to order such a remedy.* Thus *Food Store* in large measure controls our disposition of that issue in this case.

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* My views on the issues in *Tiidee I* and *II* are set forth in my dissenting opinions to those decisions. In this third stage of the *Tiidee* proceedings, the opportunity to consider as a matter of first impression the adequacy and legal soundness of the Board's supplemental decisions and amended orders has been circumscribed by the intervening *Food Store* decision, decided by another panel of this court. In these circumstances, and because of my prior participation in *Tiidee I* and *II*, it is peculiarly appropriate to set forth my individual views on three basic issues. These personal views are set forth in this footnote*, and in footnotes** and ***, *infra*. As to footnote **, we all recognize that we are bound by the law of the case but my prior familiarity with the record in *Tiidee I* and *II* compels me to reaffirm my individual dissent in those cases with additional detail. As to footnotes * and ***, Judges Tamm and Robb feel that debate in this circuit has been foreclosed by Food Store Employees Union, Local No. 347 Amalgamated Meat Cutters v. NLRB, 155 U. S. App. D. C. 101, 476 F. 2d 546, *cert. granted*, 94 S. Ct. 567 (1973). As my authorship of the opinion for the court demonstrates, I agree that *Food Store* is controlling; nonetheless, I feel it necessary to express my personal opinion on what I perceive as relatively clearcut and as yet not illuminated issues.

It is my individual opinion that section 10(c) does not authorize the Board to award attorney fees. Traditional American jurisprudence circumscribes even the power of the courts to award attorney fees. There are, of course, several well established exceptions to the American rule prohibiting their award by the courts. Hall v. Cole, 412 U. S. 1 (1973). The award of attorney fees by a statutory board in this case is predicated upon a congressional grant of authority pursuant to secton 10(c) of the Act. The broad language of that section, however, does not compare favorably with the explicit, unambiguous and specific language consciously selected by Congress in other statutes. For example, the Interstate Commerce Act provides that "[i]f the plaintiff shall finally prevail [in court] he shall be allowed a reasonable attorney's fee, to be taxed and collected as part of the costs of the suit." 49 U. S. C. § 16(2) (1970). Similarly, the Clayton Act specifically requires that a person injured by a violation of the antitrust laws "shall recover [in court] the cost of suit, including a reasonable attorney's fee." 15 U. S. C. § 15 (1970). Thus the unvarying rule is that when Congress intends to permit the courts to award attorney fees to the prevailing party in statutory causes of action, it does so with precision and unmistakable clarity. *E.g.*, Packers and Stockyards Act, 1921 § 309(f), 7 U. S. C. § 210(f) (1970); Perishable Agricultural Commodities Act § 7(b), 7 U. S. C. [§*] 499g(b) (1970); Trust Indenture Act of 1939 § 323(a), 15 U. S. C. § 77www(a) (1970);

(Continued on Next Page)

[* See erratum, *infra*, p. A26.]

Food Store involved " 'clearly aggravated and pervasive' misconduct [by the employer, and the Board] questioned [the em-

Securities Act of 1933 § 11(e), 15 U. S. C. § 77k(e) (1970); Securities Exchange Act of 1934 §§ 9(e), 18(a), 15 U. S. C. §§ 78i(e), 78r(a) (1970); Copyright Act § 116, 17 U. S. C. § 116 (1970); Labor-Management Relations Act (Taft-Hartley Act) § 303, 29 U. S. C. § 187(b) (1970) (relating to secondary boycotts) (*see also* Local 20, Teamsters, Chauffers & Helpers Union v. Morton, 377 U. S. 252, 260 n. 16 (1964)); Fair Labor Standards Act of 1938 § 16(b), 29 U. S. C. § 216(b) (1970); Servicemen's Readjustment Act § 1822(b), 38 U. S. C. § 1822(b) (1970); Civil Rights Act of 1964 § 706(k), 42 U. S. C. § 2000e-5(k) (1970); Railway Labor Act § 3(p), 45 U. S. C. § 153(p) (1970); Communications Act of 1934 § 206, 47 U. S. C. § 206 (1970).

Absent statutory authority, courts may, in the exercise of their inherent equitable powers, award attorney fees in certain carefully circumscribed situations where "overriding considerations indicate the need for such a recovery." Hall v. Cole, *supra,* at 4-5. An administrative agency possesses no such inherent equitable power, however, for it is a creature of the statute that brought it into existence; it has no powers except those specifically conferred upon it by statute. The Board's power to award attorney fees, then, depends exclusively upon section 10(c). That section admittedly constitutes a broad grant of authority, Phelps-Dodge Corp. v. NLRB, 313 U. S. 177 (1941), but in that very broadness, as contrasted to the statutes cited above, lies the fatal flaw to any argument that the Board has the power to order reimbursement for attorney fees and other litigation expenses. Section 10(c) grants the Board the authority to order an employer or union to "take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of" the Act. The words "affirmative *action*" are calculated more to connote that type of action ordinarily ordered by the Board in unfair labor practice cases, such as ordering the parties to engage in collective bargaining, to cease and desist from unfair labor practices, refrain from secondary boycotts, cease unlawful picketing, and so forth. Moreover, where monetary compensation is involved, the Congress thought it necessary to state explicitly that employees could be "reinstated with or without *back pay.*"

There is yet another significant weakness in the argument that section 10(c) authorizes the Board to award attorney fees. The Labor Act, especially after the 1947 amendments, was intended carefully to adjust and balance the rights and interests of labor, management and the government; the Act manifestly was designed to provide fair and even-handed treatment. The award of attorney fees pursuant to section 10(c) demonstrably does violence to these

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ployer's] good faith because of its 'flagrant repetition of conduct

fundamental precepts, however, for no comparable remedy is available against a *charging* party even though in filing a charge and causing a complaint to issue he may be motivated by the same illegal reasons (a pattern of illegal resistance to unionization) and be engaged in the same conduct (frivolous litigation) on which such award is premised in *Food Store* and the instant case. The "affirmative action" clause in section 10(c) applies only against the *charged* party. By contrast, a charging party, who is a party of right (29 C. F. R. § 102.8 (1973)) permitted fully to litigate the case at the hearing (29 C. F. R. § 102.38 (1973)) and before the Board, may file a charge based on totally false facts or raise totally frivolous issues for the purpose of infringing an employer's protected rights and yet, if the Board determines that the complaint based on such a charge is totally without merit, section 10(c)'s second proviso provides *only* that "the Board shall state its findings of fact and shall issue an order dismissing the said complaint." And, although it may be hoped that the regional directors or the General Counsel would weed out such charges and not issue a complaint, it is clear that such frivolous cases may occur, especially since neither the Act (section 10(b)) nor the regulations (29 C. F. R. § 101.4 (1973)) requires any investigation of the charges prior to the issuance of a complaint. Thus, although perfect symmetry is not required or even expected, the fact that a charging party who engages in frivolous litigation escapes completely unscathed while his counterpart, for example the Company in this case, is liable for large litigation expenses strongly suggests that the Congress never intended the Board to possess the power to impose attorney fees and other litigation expenses.

It is also of critical importance in construing so broad a grant of authority, one thought by Congress best to reside in "the empiric process of administration," *Phelps-Dodge, supra,* at 194, that in the entire 39-year history of the Act section 10(c) has never before been interpreted to support the exaction of attorney fees in cases such as this. This consistent administrative interpretation and practice for so many years argues persuasively against change by the Judiciary. After more than a decade of operation without such a remedy, section 10(c)'s precise language survived intact the 1947 Taft-Hartley Amendments. Moreover, in all the 39 years of legislative history surrounding section 10(c), none of it gives any support for the interpretation that Congress intended to allow the Board to award attorney fees and litigation expenses to prevailing parties. Therefore, if the complaint be made that the powers of the Board are inadequate, let it be made to the Congress and not the Judiciary—any proper conception of, and respect for, the relative domains of each demands no less.

It would, moreover, be unsound policy to invest the Board with the power to grant attorney fees, for theory rarely is con-

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previously found unlawful' at other [of its] stores."[14] The premise for sustaining the award of litigation expenses in *Food Store* was that

> employers who follow a pattern of resisting union organization, and who to that end unduly burden the processes of the Board and the courts, should be obliged, at the very least, to respond in terms of making good the legal expenses to which they have put the charging parties and the Board.[15]

As stated above, we do not write today on a clean slate but are bound as to the law by *Food Store*. That being so, we are led inexorably to the conclusion that if the facts of *Food Store* presented an appropriate case for the award of attorney fees, then, *a fortiori,* the instant case does also.[16] The element of frivolus litigation, as the *Tiidee I* court decided exists in this case, presents a different and even stronger situation for awarding litigation expenses if the payment of attorney fees can be ordered paid for flagrant repetition of conduct violative of the National

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gruent with reality. It may well be a reassuring proposition to state that attorney fees will only be awarded in frivolous or flagrant cases, but the predicates of the adversary system augurs intense litigation over the very premise of such an award, that is, whether a case is frivolous or flagrant. Such synergistic circumstances would greatly increase the number and complexity of cases before the Board, and what began as a means of ridding the Board and the courts of frivolous cases (which are relatively few in number) would finally produce quite the opposite result and add greatly to the Board's burdens.

I would require a more clearly expressed statutory mandate to authorize the Board to order a remedy in which even the courts seldom indulge.

14. 155 U. S. App. D. C. at 106, 476 F. 2d at 551.

15. *Id.*

16. We are, of course, cognizant of the somewhat disturbing circularity of this approach—the Board reacted to the strong remand in *Tiidee I* by imposing attorney fees, *Food Store* then relied on the Board's supplemental decision in *Tiidee I* after our remand, and now we, in *Tiidee III,* rely in large part on the precedent established by *Food Store* to sustain the imposition of attorney fees and other litigation expenses.

Labor Relations Act. The court's finding in *Tiidee I* that, on the facts presented, the Company had engaged in frivolous litigation constitutes the law of this case.** The court's articulation of that

** Although it is the law of this case, it is my individual opinion (*see* note*, *supra*) that the Company's conduct of this litigation is not as frivolous as the adjectival characterizations of the *Tiidee I* majority would suggest. The Company had a legitimate complaint against the Union's circulation of a misrepresentative handbill to the employees on the very day of the election, just eight hours prior to the balloting. The handbill misrepresented the issues in the election by holding out the alluring promise that "greater benefits" were "exactly" what a "Yes vote" would produce. Report on Election, Exhibit A, J. A. at 220. Board decisions, however, generally allow unions some latitude in this area, to the extent that they may promise benefits they may be unable to procure. *See, e.g.*, Burson Plant of the Kendall Co., 115 NLRB 1401 (1956); Olson Rug Co., 118 NLRB 1274 (1957). The interjection of such misrepresentative matter at the last minute so that the employer cannot respond, however, must be viewed in a different light. In this context, the Company justifiably could feel unfairly treated on the significant question of whether it would be unionized. But for the late hour at which the handbill was distributed, the Company could and probably would have responded with a handbill of its own to inform the employees of the precise implications of a "Yes vote" in the election.

The obvious strategical move, calling a meeting of the employees to answer the Union's misleading literature in a speech, was prohibited by the *Peerless Plywood* rule. Peerless Plywood Co., 107 NLRB 427 (1953). Under *Peerless*, while "unions or employers [may] circulate campaign literature on or off the premises at any time prior to an election," *id.* at 430, they are "prohibited from making election speeches on company time to massed assemblies of employees within 24 hours before the scheduled time for conducting an election." *Id.* at 429. Thus the Company was effectively precluded from answering what it considered to be unfair and misleading campaign propaganda and tactics, the obvious purpose and intent of which was to influence the election against the Company.

When the election resulted in a union victory, the Company naturally and justifiably inferred that the misleading campaign propaganda had influenced the result to some degree. The Company undoubtedly thought that in logic and reality such last minute handbilling is indistinguishable from last minute speeches, which the Board has recognized "tends to create a mass psychology [and is] the last most telling word." *Id.* Mousetrapped between the 24 hour no-speech rule and the rule permitting unions to propagandize up to the time of balloting, the Company felt it imperative to make legal objections to the election. The Regional Director investigated,

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finding [is a harsh litany: the Company's conduct was a clear*]

but did not hold any hearing on the Company's objections and ruled against the Company. He found that the Union's handbill's did not influence the election result, *a conclusion contrary to the obvious effect intended by the Union.* It may be cogently argued that a hearing was necessary in order to determine the psychological and practical effect of the Union's handbilling immediately prior to the election. Employees could have been called to determine whether they thought that as a result of a union victory they would be guaranteed greater benefits as the literature promised. The Trial Examiner almost casually termed as "frivolous" the Company's failure to acquiesce to the Regional Director's decision, even though *the Company's refusal to bargain was the only method under the Act by which it could seek review of that decision.* The trial examiner would have to have been prescient to realize he was opening a Pandora's box of complex and protracted litigation by this casual reference, when subsequently the *Tiidee I* majority greatly expanded his factual finding to make the Company's position "palpably" and "patently" frivolous. *See* text following this note. Viewed in total context, one could [*] not fairly characterize as frivolous the actions taken by the Company; the Company's conduct, moreover, could hardly be termed any more frivolous than the Union's demand for a remedy never previously ordered in the entire 39-year history of the Act and still thought by the Board not to be within its power under section 10(c) to grant.

The analysis of Chairman Miller of the NLRB in his dissent in *Tiidee II* supports his conclusion that the Company's defenses in that case had not been "asserted frivolously." His dissenting opinion stated:

> As the majority opinion points out, our decision in *Tiidee I* to award costs and attorneys' fees was based on the court's finding that the litigation there had been frivolously engaged in by Respondent.
>
> In reviewing the record in the instant case, I am unable to find that the defense here was asserted frivolously. *The majority opinion here seems to me to evade this issue and to rely on the extent of Respondent's unfair labor practices (which, however reprehensible, are no more extensive than those committed by both unions and employers in a considerable percentage of the 800 or so cases we review each year) and on the degree of Respondent's union animus and hostility.* But the degree of Respondent's hostility has little or nothing to do with the frivolity of its defenses to the allegations of the complaint in this proceeding.
>
> For these reasons I dissent from that portion of this Decision which awards costs and attorneys' fees.

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[* See erratum, *infra*, p. A26.]

and flagrant violation of the law"[17]; "its objections to the election were patently frivolous"[18]; the Company's action was "a brazen refusal to bargain, in violation of solemn obligations"[19]; its position was "palpably without merit"[20]; and the case involved "a manifestly unjustifiable refusal to bargain."[21] In light of the precedent established by *Food Store* and of the court's decision in *Tiidee I* as to the law and the facts, stare decisis and the law of the case leave us no recourse but to enforce at least in part the Board's award to the Union of attorney fees and litigation expenses.

III

Difficulties remain, however, as to the manner in which the *Food Store* and *Tiidee* decisions may be accommodated with our view of the Board's orders in this case. Two significant issues, therefore, must be confronted. First, whether the Board itself should be reimbursed for its expenditures in litigating this case, and second, whether legal expenses during the full course of this litigation should be allowed. We answer both in the negative.

A. *Reimbursement to the Board*

Any remedy ordered by the Board under section 10(c) must satisfy the ultimate standard that it is designed both in intent and operation to effectuate the policies of the National Labor

196 NLRB at 157 (emphasis added). The italicized statement is equally applicable to the court's majority opinion in *Tiidee I*.

Although I recognize that the Company faced a very difficult position so far as the Board and its decisions were concerned, I also believe that the Company had legitimate grounds for considering as a matter of simple justice that it did have a valid complaint, as the trial examiner did, by the statement that the handbill did not influence the election, is completely speculative and denies that the handbill had the very effect that its authors and distributors intended it to have.

17. *Tiidee I, supra* note 2, at 254, 426 F. 2d at 1248.

18. *Id.*

19. *Id.* at 255, 426 F. 2d at 1249.

20. *Id.* at 256, 426 F. 2d at 1250.

21. *Id.*

Relations Act. Three rationalizations may be advanced to support the proposition that the imposition of attorney fees and other legal expenses in cases of frivolous litigation effectuates the policies of the Act: (1) the policies underlying the traditional American rule against awarding attorney fees are unpersuasive in such cases[22]; (2) the remedy would effectively prevent the diversion of administrative resources from mer-

22. The American rule generally disfavors the award of attorney fees and other litigation expenses except where specifically provided for by statute or contract. Hall v. Cole, 412 U. S. 1, 4 (1973). *See. e.g.,* Clayton Act § 4, 15 U. S. C. § 15 (1970); Interstate Commerce Act § 16, 49 U. S. C. § 16(2) (1970); Fleischmann Distilling Corp. v. Maier Brewing Co., 386 U. S. 714, 717 (1967); Hauenstein v. Lynham, 100 U. S. 483 (1880). *Food Store,* [*] *supra,* has established for this circuit that the power to award attorney fees does repose in section 10(c), *i.e.,* that the statute here is within the recognized exception to the general rule. As a matter of guiding principle we note, however, that the rationales underlying the traditional rule, *see* Fleischmann Distilling Corp. v. Maier Brewing Co., 386 U. S. 714, 718 (1967); McCormick, *Counsel Fees and Other Expenses of Litigation as an Element of Damages,* 15 Minn. L. Rev. 619, 639-40 (1931), are soundly applicable only in cases involving meritorious or colorable legal claims and defenses. *See* Amalgamated Local Union 355 v. NLRB, 481 F. 2d 996 (2d Cir 1973).

23. The *Tiidee I* court was concerned that such frivolous litigation as that engaged in by the Company would "drain and divert judicial resources from the provision of justice to the crowded calendars and to meritorious litigants whose claims clamor for attention. The same considerations are presumably applicable at the administrative level." *Supra* note 2, at 256, 426 F. 2d at 1250. In this respect, it would be disingenuous to fail to recognize explicitly that the litigation expenses remedy has a deterrent aspect and thus arguably falls within the ambit of Republic Steel Corp. v. NLRB, 311 U. S. 7 (1940). The instant case, however, presents somewhat different factual circumstances and the award of legal expenses, at least to the Union, may more cogently be described as remedial. *See* note 24 *infra.* This assertion assumes the proportions of semantic jousting, but the cavil may be raised as to any "remedial" order that it also has an impermissible deterrent effect. If *Food Store, supra,* is to be relied upon, however, this does not preclude its use where its primary thrust is truly remedial.

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[* See erratum, *infra,* p. A26.]

itorious cases[23]; and (3) the award of such costs might help restore the Union to the status quo ante.[24]

In *Food Store,* the court enlarged the Board's order to include the award of litigation expenses to the Board as well as the union. The court found it unnecessary on the facts and legal theory there involved to consider explicitly whether an award of legal expenses to the Board involved considerations distinct from granting such reimbursement to a union. The significantly distinguishing feature of *Food Store* was the employer's comprehensive pattern of illegal resistance to any form of unionism. The court succinctly summarized the employer's predilection for unlawful conduct:

> The employing company . . . is not a stranger to the processes of the Board. Operating a chain of discount stores in the Southeast, this is the eleventh time that its resistance of union organization has embroiled it in Board proceedings. In none has it prevailed at the Board level, and its fortunes in the Courts of Appeals have been only marginally better.[25]

The *Food Store* court thus held that an employer who egregiously continues to violate the Act must reimburse both the Board and the union for their legal expenses.

By contrast, in the instant case we are confronted with an

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24. Frivolous litigation on a protracted basis might be so burdensome financially as to interfere seriously with the ability of the affected party to function and act effectively. In such circumstances, the claim is made that this remedy in part may also be designed to restore the injured party to the status quo ante, a well recognized goal of the Board's remedial powers. Phelps-Dodge Corp. v. NLRB, 313 U. S. 177, 194 (1941); Decaturville Sportswear Co. v. NLRB, 406 F. 2d 886, 889 (6th Cir. 1969); Local 57, International Ladies' Garment Workers' Union, AFL-CIO v. NLRB, 126 U. S. App. D. C. 81, 86, 374 F. 2d 295, 300, *cert. denied,* 387 U. S. 942 (1967); *see* Local 60, United Brotherhood of Carpenters & Joiners of America v. NLRB, 365 U. S. 651 (1961). The award of attorney fees based on this principle, however, greatly exceeds the manner in which it normally has been applied by the Board and the courts.

25. 155 U. S. App. D. C. at 102, 476 F. 2d at 547. *See also* text accompanying notes 14-15 *supra.*

employer who actually is a "stranger to the processes of the Board," however wilful his violation and frivolous his defenses. Confronting this situation, the *Tiidee I* court demonstrably was concerned principally with assuring adequate remedial relief to the Union rather than to the Board. The entire thrust of the *Tiidee I* decision, as evidenced by the discussion on make-whole relief, focused on remedying the harm suffered by the Union because of the Company's conduct. Indeed, in suggesting the alternative relief of reimbursement of litigation expenses, the *Tiidee I* court specifically contemplated that only the Union would receive such an award.[26] Moreover, although reimbursement to the Board arguably might be consistent with the incidental rationale in *Tiidee I* of preventing the diversion of administrative resources from meritorious cases, any such advancement of that policy would only be cumulative to that produced by reimbursement to the Union. Thus, while *Food Store* established the power of the Board to award legal expenses to itself,*** the present case does not present an ap-

26. *See* text accompanying note 13 *supra.* Thus the law of the case also dictates that an award of legal expenses to the Board exceeds "[t]he scope of the Board's consideration on remand." *Id.* United States Court of Appeals in an action in which the Board has successfully petitioned such court to hold in civil contempt a party who has violated that court's final order granting enforcement to a Board order. Dallas General Drivers, Warehousemen and Helpers, Local Union No. 745 v. NLRB, ... U. S. App. D. C. ....., ... F. 2d ..... (No. 20,565, *et al.*, April 17, 1974); West Texas Utilities Co. v. NLRB, 92 U. S. App. D. C. 224, 206 F. 2d 442, *cert. denied*, 346 U. S. 855 (1953).

*** It is my individual opinion, again in which my brothers do not join, that an award of attorney fees and other litigation expenses to the Board itself falls within the prohibition of Republic Steel Corp. v. NLRB, 311 U. S. 7 (1940), which precludes the use of a pure deterrence rationale as a basis for upholding orders under section 10(c). In *Republic Steel* the Board ordered an employer to deduct from payments to employees reinstated with back pay amounts they had earned on public work relief projects and to pay such deducted amounts to the appropriate government agencies. The Court characterized such payments as "exactions" and stated that

> it [*] is not enough to justify the Board's requirements to say that they would have the effect of deterring persons from

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[* See erratum, *infra*, p. A26.]

propriate situation for its exercise. Accordingly, the orders here under review shall be modified by deletion of any requirement of payment by the Company to the Board for attorney fees and other legal expenses.

B. *Limitation on Reimbursement to the Union*

The Company also contends that litigation expenses should not be allowed beyond the date of the Board's initial *Tiidee I* decision because as of that date it assertedly was ready and willing to bargain in good faith and the litigation subsequent to that date was related only to the determination of remedies appropriate to already conceded section [*] 8(a)(5) violations.[27] We find this argument persuasive. We sustain in principle the award of litigation expenses in this case because the *Tiidee I* court found that the Company raised frivolous defenses before the Board. All litigation subsequent to that date, however, certainly did not involve frivolous litigation by the Company—indeed, the opposite is true. After the Board's decision in *Tiidee I*, the Company only sought to sustain the *Board's position* that traditional relief was adequate, and to resist an attempt by the Union to have the Board impose the exceptionally novel remedy of make-whole relief, a remedy that has never been ordered in the 39-year history of the Act.[28] The Board

violating the Act. That argument proves too much, for if such a deterrent effect is sufficient to sustain an order of the Board, it would be free to set up any system of penalties which it would deem adequate to that end.

Id. at 12. Since the NLRB was created and exists for the purpose of determining unfair labor practice cases and otherwise discharging its duties under the Act, reimbursement to the Board of legal expenses incurred in the discharge of its statutory duties under section 10(c) could only be justified on the impermissible rationale of deterrence. By contrast, this court has held that the Board may be reimbursed for attorney fees and other litigation expenses by a

27. Company Br. at 9, 17-18.

28. The union demand, made originally before the trial examiner, was that the

Respondent [Company] make the employees whole for wages

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[* See erratum, *infra*, p. A26.]

agreed with the Company at the outset of this litigation, before this court in *Tiidee I* indicated that such relief might be possible. Moreover, the Board continues to hold firmly the belief that it is without the power under section 10(c) to award the make-whole relief demanded by the Union.[29]

It is arguable, of course, that the section 8(a)(5) violations and the ensuing frivolous litigation before the Board cannot realistically be separated from attempts by the Union legally to cure the harm that they caused. Moreover, the limitation we delineate today might permit an employer to decimate a union, or vice versa, and escape imposition of remedial orders that comprehend the totality of his actions simply by vowing a change of heart. Thus we do not rely on the Company's assertion that after the Board's *Tiidee I* decision it was ready and willing to bargain. Nevertheless, we recognize that these protracted proceedings clearly constitute what is, in effect, a test case by the Union to establish the viability of a new concept of make-whole relief that amounts to an unprecedented remedy. We therefore think the Company should not, because of its misconduct at the start of the case, be forced fully to subsidize the Union's legal efforts in such a case.

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and benefits which they might have received but for the Respondent's unlawful refusal to bargain, and that the Respondent be required to pay the Union the amount of dues and initiation fees it lost dating from 130 days after the Union was certified.

Jt. App. at 48.

29. The Board stated in its supplemental decision in *Tiidee I:*

In *Ex-Cell-O* the Board majority enunciated its conclusion that Congress did not give the Board statutory authority to grant the compensatory monetary remedy requested by the Union. The court of appeals disagreed with this view of the scope of the Board's statutory remedial power and it remanded these cases to the Board for further proceedings not inconsistent with the court's opinion. Although *the Board adhers to the views expressed in Ex-Cell-O,* inasmuch as it has accepted the remand, it considers itself bound by the court's opinion as the "law of the case."

194 NLRB at 1234 (emphasis added).

In the *Tiidee II* supplemental decision the Board examined the Company's conduct "in the total context of [its] entire course of unfair labor practices" and found that, in view of its finding "in *Tiidee I* that frivolous issues were raised and litigated to postpone or avoid a lawful obligation to bargain, [the Company's] conduct in the instant case is so inextricably intertwined with [its] refusal on frivolous grounds to bargain with the Union as to require the conclusion that it was part of the same pattern of patently frivolous litigation for the same unlawful object. . . ."[30] Although we believe that the Company's legal position in *Tiidee II* cannot fairly be characterized as frivolous, there is ample support in the record for the finding that its conduct in *Tiidee II* was also designed to "postpone or avoid a lawful obligation to bargain" so that an award of litigation expenses properly is sustainable under *Food Store, supra.* As noted above, however, the award must be limited to expenses incurred in litigating the initial case before the Board and therefore does not extend to any subsequent legal proceedings involving the question of appropriate remedies.

In summary, the orders relating to the award of attorney fees and other litigation expenses are modified to delete any requirement that the Company reimburse the Board for its legal expenses, and to limit reimbursement to the Union to expenses it incurred only for litigation before the Board in the initial *Tiidee I* and *II* decisions.

IV

The Board refused to grant the broad make-whole remedy requested by the Union and the Union now strenuously argues that in so doing the Board failed to comply with this court's directives on remand. The Union's argument rests principally upon two grounds. First, that our decision in *Tiidee I* mandated a make-whole remedy, and second, that the Board improperly relied upon the difficulty of ascertaining the contract terms that

30. Tiidee Products, Inc., 196 NLRB 158 (1972); Jt. App. at 126.

would have been agreed to had the Company bargained in good faith. The first argument has little merit. The *Tiidee I* court quite clearly did not require imposition of a broad make-whole remedy; indeed, it indicated that the Board could select remedies other than make-whole relief if they would adequately effectuate the policies of the Act and were supported by reasoned analysis.[31]

The second contention of the Union has more substance but on full consideration it too must fail. The court in *Tiidee I* drew a distinction between contract terms that "would" and "should" have been agreed to by the parties had they bargained together in good faith to agreement. Although the Board does not have the power to impose "should" contract terms or to grant make-whole relief where no agreement would have been reached, the *Tiidee I* court clearly stated that:

> A tribunal given the function of implementing national policy through compensatory remedies may not soundly refer to the difficulty in quantifying appropriate compensation as a justification for withdrawal and frustration of the policy, particularly where such an approach would operate only to reward the wrongdoer and to give him an advantage over a law-abiding competitor.[32]

It is necessary, therefore, to examine and determine the sufficiency of the record evidence that would form the basis for awarding make-whole relief.

At the unfair labor practice hearing in *Tiidee I*, the trial examiner freely allowed the Union to introduce evidence in support of its make-whole request. And, in its Statement of Position of Charging Party on Remand,[33] the Union proffered certain evidence to establish the compensation and fringe benefits earned by employees prior to certification and what they could be expected to have received had the Company bargained in

31. *Tiidee I, supra* note 2, at 259, 426 F. 2d at 1253.
32. *Id.* at 257, 426 F. 2d at 1251.
33. Jt. App. at 135, 144-69.

good faith. This evidence is of limited relevance, however, because it, for example, refers to bargaining units of much greater size than the Union's, lumps all manufacturing industries together, and generally consists of national, rather than local, statistics.[34]

The precise issue, then, is whether this evidence validly could be translated into specific contract terms that would have been agreed to by both the Union and the Company had they bargained together in good faith to an agreement. The Board specifically found that it could not "ascertain with even approximate accuracy . . . what the parties '*would* have agreed to.' "[35] Moreover, the Board also seemed to suggest that the parties might not have reached any agreement at all.[36] We have closely examined the record evidence and cannot conclude that the Board's finding on this issue was without substantial support in the evidence.

There is yet another basis for affirming this aspect of the Board's decision, however, for it appears that the Board permissibly balanced the difficulty in this particular case of ascertaining the contract terms that would have been agreed to against the relative ease and certainty of awarding litigation expenses to the Union and ordering other affirmative remedies. The Board found that make-whole relief was "not practicable"[37] in this case, and that it "would effectuate the policies of the Act to grant some but not all of the requested relief."[38] Thus the Board found that its selection of affirmative remedies was an adequate alternative means of effectuating the Act's policies and satisfying the directives of the *Tiidee I* and *II* remands.[39]

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34. *Id.*

35. Tiidee Products, Inc., 194 NLRB 1234, 1235 (1972).

36. *Id.*

37. *Id.*

38. *Id.* at 1234.

39. The Board declined to remand the case to a trial examiner to attempt to gather further evidence on the make-whole remedy.

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The *Tiidee I* court was "particularly" concerned that reliance on "the difficulty in quantifying appropriate compensation . . . would operate only to reward the wrongdoers"; this concern is largely vitiated by the additional remedies ordered in this case, including limited litigation expenses.[40] On these facts, given our limited scope of review, we are not disposed to overturn this finding.

V

The Union also requested compensation from the Company for Union member's dues and fees allegedly lost to it because of the Company's flagrant refusal to bargain. The Board premised its denial of this relief on two grounds. First, it argues that such relief is part and parcel of the broad make-whole remedy denied in this case since such items would come from "lost" wages.[41] Second, it felt that since it was the Union's policy to waive such dues and fees until after a contract had been signed, the risk of losing monies when no contract is signed should not be shifted from the Union to the Company.[42] *Food Store, supra,* considered this same issue and sustained the Board's denial of such relief in that case. *Food Store* premised its holding, *inter alia,* on the fact that "[i]t is undoubtedly true that union security clauses have attained a wide degree of use, but it also remains true that an employer may bargain to im-

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It found that such action would be "counter-productive" and that it would not effectuate the policies of the Act to do so. *Id.* at 1235. The Company was under order to bargain with the Union and thus would not be likely to agree to any contract that might serve as a basis for establishing make-whole relief. Also, the Union had already had full opportunity to present such evidence. *See* text accompanying note 33 *supra.*

40. Our limitation on the legal expenses recoverable by the Union does detract somewhat from the implicit balancing process in which the Board appears to have engaged, but we think that the clear dictates of the law, combined with the additional affirmative actions required of the Company, satisfactorily resolve the complex of problems presented in this case.

41. Tiidee Products, Inc., 194 NLRB 1234, 1236 (1972).

42. *Id.*

passe with respect to such a demand, and that the Board may not impose that obligation upon the employer. *H. K. Porter Co.* v. *NLRB*, 397 U. S. 99 (1970)."[43] We reaffirm that holding.

The Board also denied the Union's request for reimbursement of organizational expenses supposedly lost because of the Company's refusal to bargain. The Union argues that this remedy should be ordered because the money it spent in preelection organization efforts was "rendered a complete waste" due to the unlawful refusal to bargain.[44] It points out that the delay in bargaining caused loss of interest in the Union and loss of membership.[45] We agree with the Board, however,

> that the Union incurred no extraordinary organizational expenses . . . Despite certain already remedied preelection unlawful [Company] conduct, the Union was selected by the employees after a 2-month campaign at the first election held. We find, therefore, no nexus between [the Company's] unlawful conduct here under examination and the Union's preelection organizational expenses. . . .[46]

Thus the Union incurred only normal organizational expenses in its campaign for election. In *Food Store*, by contrast, organizational expenses were allowed because there the employer's pervasively unlawful conduct required the expenditure of extraordinary amounts of money.[47] Moreover, it should be noted that the purpose of an organizational drive such as that conducted by the Union is to gain majority status among the unit employees, win the representation election and obtain

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43 Food Store Employees Union Local, No. 347 v. NLRB, 155 U. S. App. D. C. 101, 107, 476 F. 2d 546, 552, *cert. granted*, 94 S. Ct. 567 (1973). The court also noted with approval the second ground asserted by the Board in the instant case to deny payment of dues and fees. *Id.* at 107 n. 10, 476 F. 2d at 552 n. 10.

44. Union Br. at 32.

45. *Id.*

46. Tiidee Products, Inc., 194 NLRB 1234, 1236 (1972).

47. 155 U. S. App. D. C. at 106, 476 F. 2d at 551.

certification. A principal benefit gained by this process is certification as the exclusive bargaining agent for the unit. The Union here achieved this status and the one year protective period guaranteed by such certification will not begin to run until the Company begins to bargain in good faith with the Union.[48] The denial of organizational expenses to the Union must be affirmed since it was not forced to make extraordinary expenditures and those normal expenses it did incur were not rendered a complete waste.

As modified herein, the amended orders under review shall be enforced.

It is so ordered.

48. Tiidee Products, Inc., 174 NLRB 705, 714, 705-06 (1969); NLRB Br. at 33 n. 40.

UNITED STATES COURT OF APPEALS

For the District of Columbia Court

Nos. 72-1080 and 72-1365

INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent,

TIIDEE PRODUCTS, INC.,

Intervenor.

Nos. 72-1691 and 72-1692

TIIDEE PRODUCTS, INC.,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent,

INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO,

Intervenor.

Before. TAMM, MACKINNON, and ROBB, *Circuit Judges.*

ORDER

It is ordered by the Court, *sua sponte*, that the opinion of April 25, 1974 in the above entitled cases is amended as follows:

On Page 8, line 28 of text, after U. S. C. and before 499g(b), insert "§";

On Page 14, move the line at the top of the text to a point between the first and second lines of text;

On Page 16, line 8 of footnote 22, italicize the words *"Food Store, supra"*;

On Page 19, line 12 of text, strike the numeral "2", so that the letters and numerals will read: "section 8(a)(5)";

On Page 19, line 1 of the footnote, strike the brackets from the word "[i]t" so as to read "it".

Per Curiam
For the Court:
/s/ HUGH E. KLINE
Hugh E. Kline
Clerk

UNITED STATES COURT OF APPEALS
For the District of Columbia Circuit
Washington, D. C. 20001

April 25, 1974

Office of the General Counsel
National Labor Relations Board
1717 Pennsylvania Avenue, N. W.
Washington, D. C. 20570

In Re: Nos. 72-1080—International Union of Electrical,
72-1365—Radio and Machine Workers, AFL-CIO, v. N. L. R. B.
72-1691—Tiidee Products, Inc. v. N. L. R. B.
72-1692

Dear Sir:

Enclosed is a copy of the opinion of this Court filed today in the above entitled cases. I have been directed to communicate with you and request that the National Labor Relations Board file a proposed judgment consistent with the enclosed opinion pursuant to the provisions of Rule 19 of the Federal Rules of Appellate Procedure.

Very truly yours,

/s/ HUGH E. KLINE
Hugh E. Kline
Clerk

cc: Ruth Weyand, Esquire
Alan Raywid, Esquire
Winn Newman, Esquire
Roy E. Brown, Esquire
Lawrence M. Cohen, Esquire

CERTIORARI DENIED